SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 27

UTAH PHARMACEUTICAL ASSOCIATION, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the court below is officially reported at 201 F. Supp. 29.[1] The proceedings in which the court below disposed of the appellant's Motion for New Trial Pursuant to Rule 59, Federal Rules of Civil Procedure by denying it are unreported.[2]

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[1] App., *infra*, pp. 1a-13a.

[2] App., *infra*, pp. 14a-18a.

JURISDICTION

The appeal herein is taken directly to the Court from a final judgment rendered against the defendant (appellant) by the court below in an action arising under Section 1 of the Sherman Act, 15 U.S.C. Section 1. The judgment sought to be reviewed was dated January 31, 1962, and entered in the Docket of the court below, The United States District Court for the District of Utah, Central Division, as of February 1, 1962. The defendant subsequently filed a timely motion for new trial pursuant to 28 U.S.C. Rule 59, F.R.C.P., on February 9, 1962, which was denied by the court below on February 21, 1962, at which time the judgment below became final. The notice of appeal was filed timely in the court below on April 20, 1962. The statutory provision conferring jurisdiction of the appeal on this Court is Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. Section 29.

Cases sustaining the jurisdiction of this Court of the appeal are *Brown Shoe Co.* v. *United States*, —U.S. —, 8 L. Ed. 2d 510, 523-524, 558 (1962); *United States* v. *Du Pont De Nem. & Co.*, 366 U.S. 316, 324 (1961); *United States* v. *California Co-Op Canneries*, 279 U.S. 553, 555 (1929); *Civil Aeronautics Bd.* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 341 (1961); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944); *Leishman* v. *Associated Wholesale Elec. Co.*, 318 U.S. 203, 205 (1943); *United States* v. *Seminole Nation*, 299 U.S. 417, 421 (1937); *Morse* v. *United States*, 270 U.S. 151, 153-154 (1926); *United States* v. *Ellicott*, 223 U.S. 524, 539 (1912).

* By order dated June 14, 1962, the time within which the appellant might file its Jurisdictional Statement was extended from June 19, 1962 through August 18, 1962, by the court below pursuant to Rule 13, Supreme Court of the United States Revised Rules.

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Were the activities of the defendant, complained of in the Complaint as consisting of participation in a conspiracy to establish and maintain uniform pricing for prescription drugs dispensed to patients in the State of Utah through the use of a particular prescription pricing schedule, in restraint of interstate commerce within the jurisdiction of Section 1 of the Sherman Act, 15 U.S.C. Section 1?

2. Was the restraint alleged in this case, which was stated to consist of a conspiracy to establish and maintain uniform pricing for prescription drugs dispensed to patients in the State of Utah through the use of a particular prescription pricing schedule, a restraint solely upon the calculating of charges for and upon the dispensing of prescriptions to patients by registered pharmacists in the State of Utah, and consequently a restraint on the practice of a learned profession wholly local in character and therefore not within the purview of Section 1 of the Sherman Act?

3. Did the defendant engage in a conspiracy to establish and maintain uniform pricing for prescriptions dispensed to patients by registered pharmacists in the State of Utah?

4. Were the activities of the defendant, drawn in question in the case as consisting of the publication and distribution of a particular prescription pricing schedule, directed to the reasonable regulation of the compensation of registered pharmacists in the State of Utah through the regulation of prescription pricing within pharmacy in Utah and not directed to the fixing of the price of a commodity, and therefore, under the

"Rule of Reason," not directed to an unlawful conspiracy to restrain interstate commerce in the State of Utah?

5. Ancillary to each of the questions presented herein is the common question as to whether the broad scope of the final judgment of the court below was proper. (The defendant questioned the broadness of the final judgment during the period of its formulation by the court below[3] and whether such judgment would allow unreasonable searches and seizures[4] as to the defendant. This substantial question must be answered not only because of its basic Constitutional nature[5] but also because of its relation to prospective burdens on the defendant.[6])

STATUTE INVOLVED

The case herein arises under Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U.S.C. Section 1, being "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act, which provides in pertinent part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or

[3] Defendants Memorandum And Recommendations To The Court Relative To The Proposed Judgment.

[4] Constitution of the United States, Amendment IV.

[5] *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944).

[6] *United States* v. *Blok*, 188 F.2d 1019 (C.A.D.C., 1951); *United States* v. *International Nickel Co. of Canada, Ltd.*, 203 F.Supp. 739 (D.C.S.D. N.Y., 1962).

with foreign nations, is declared to be illegal * * * Every person who shall make any contract or engage in any combination or conspiracy declared * * * to be illegal shall be deemed guilty of a misdemeanor * * * * *"

STATEMENT OF THE CASE

The present case was brought by the United States through the filing of a Complaint on March 7, 1961, alleging that the defendant, the Utah Pharmaceutical Association, and unnamed co-conspirators had conspired continuously from about the fall of 1954 to the date of the filing of the Complaint to restrain unreasonably interstate commerce in prescription drugs in the State of Utah. In substance such conspiracy was alleged to consist of an agreement among the said conspirators to establish and maintain uniform prices for prescription drugs sold to consumers in Utah, one of the means being the adoption and distribution of a particular prescription pricing schedule formulated by the defendant's committee on Prescription Pricing, Wages and Hours. The said conspirators were alleged to have agreed to urge and induce members of the defendant pharmaceutical association and other pharmaceutical associations in Utah to fix uniform retail prices for prescription drugs by using said particular pricing schedule and revisions thereof.

The benefits of pretrial discovery in the case were realized and substantially carried over into the trial by the parties' entering into before trial certain Trial Stipulations as to uncontested facts and the authenticity and genuineness of documentary exhibits in the case. Both the defendant and the plaintiff (appellee), however, reserved their respective rights to object to

the admissibility into evidence at the trial of matter so stipulated.

The case was tried before Judge A. Sherman Christenson on November 21-22, 1961, who in his decision on the merits adopted as his findings of fact the said Trial Stipulations as qualified and supplemented by the rulings, deductions, inferences, and conclusions stated in his decision. Of such Trial Stipulations only sections I, IV, VIII, IX, and X were offered by the plaintiff. The rest of the trial record consisted of approximately 128 exhibits, one deposition, that of Albert S. Veltri submitted on behalf of the plaintiff, and the testimony of Willis H. Muse, a witness for the defendant.

Judgment was rendered against the defendant by the trial court dated January 31, 1962, which judgment became final on February 21, 1962, upon the Court's denying the defendant's motion for new trial pursuant to Rule 59, F.R.C.P. previously filed timely on February 9, 1962. Five basic issues were presented in this case, namely: Whether interstate commerce was present so as to satisfy jurisdictional requirements; whether the acts complained of constituted a restraint on the practice of the learned profession of pharmacy wholly local in character and therefore not within the purview of Section 1 of the Sherman Act; whether as a matter of law the existence of the alleged conspiracy was proved; whether or not the challenged activities of the defendant were justifiable under proper application of the so-called "Rule of Reason" and therefore not violative of Section 1 of the Sherman Act; and ancillary to the above issues, whether the broad scope of the judgment was violative of the Fourth Amendment to the Constitution of The United States.

Interstate Commerce

The jurisdictional question concerning the presence or absence of interstate commerce centers on a determination of whether the tangible subject matter of the case, prescription drugs, were in the flow of interstate commerce at the point at which the defendant allegedly agreed to restrain their flow through the establishment of uniform pricing of them. Counsel for plaintiff admitted that the case was not based jurisdictionally on the existence of a direct and substantial effect on interstate commerce caused by defendant's actions. This case is based solely upon the alleged existence of a flow in interstate commerce of prescription drugs.[7]

Prescription drugs are the subject matter of this case. The theory of the plaintiff's case was that the defendant conspired to restrain the flow of such drugs in interstate commerce by restraining the flow thereof after they had entered the State of Utah. Such drugs could be legally dispensed to consuming patients in the State of Utah only by duly registered pharmacists and only upon prescriptions of duly licensed medical practitioners, registered and licensed respectively under the laws of Utah.[8] Not only is the dispensing of prescription drugs closely regulated by the provisions of federal law and by the laws of the State of Utah, as referred to above, but also the privilege of conducting a pharmacy and the practice of pharmacy themselves are regulated and licensed by the State of Utah.[9]

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[7] See the Official Report of Proceedings, Non-Jury Trial, in the case, page 250. Citations to the trial record in the case hereafter will appear as follows: "R. —".

[8] See the Trial Stipulations in the case, Section I, Number 4. Citations to such trial stipulations hereafter will appear as follows: "T.S., —, —".

[9] T.S., I, 31, 32; Defendant's Exhibits M, N, O, P.

Most of the drugs, the medicinal substances employed in the prescriptions in this case, used to fill prescriptions in the State of Utah are manufactured outside the State and are shipped from the place of manufacture either to wholesale drug firms located in Utah or directly to pharmacies with in the State.[10] Over 90 per cent of the prescriptions dispensed by pharmacists in the State of Utah during the period covered by the Complaint consisted of drugs which were dispensed without additional pharmaceutical manipulation by the pharmacist.[11] These drugs were shipped in large packages during their interstate shipment into the State of Utah which were broken when the drugs reached the shelves of either wholesalers or pharmacies after the termination of such shipment. Such drugs after reaching pharmacies were dispensed to individual patients in individual containers or packages by duly registered pharmacists pursuant to prescriptions of duly licensed medical practitioners.

The dollar value of prescriptions dispensed in the State of Utah by registered pharmacists members of the defendant was substantial during each year covered by the Complaint.[12] A substantial percentage of such prescriptions dispensed by Utah pharmacists employed medicinal substances which were dispensed without additional pharmaceutical manipulation by the pharmacist and which were shipped from their place of manufacture outside the State of Utah directly either to wholesale drug firms in Utah or to pharmacies in Utah, but which could not continue into the hands

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[10] T.S., I, 7.

[11] T.S., I, 5.

[12] T.S., I, 6.

of consuming patients from such interstate shipment unless and until they were dispensed by a registered pharmacist pursuant to a prescription of a duly licensed medical practitioner.[13]

There was no proof that such medicinal substances employed in prescriptions were moved from their place of manufacture outside the State of Utah to locations within the State in response to pre-existing prescription orders called for them as the physical ingredient nor was such a course of transactions alleged in the Complaint, which stated only that such drugs were shipped "* * * in response to or in anticipation of orders from pharmacists and pharmacies in the State of Utah * * * ".[14] All such drugs actually were moved to provide for future prescription orders calling for their employment. Since such drugs could be dispensed by registered pharmacists to patients only pursuant to prescription orders created by licensed physicians, the prescribing function of the physician as the prescriber of prescriptions calling for such drugs acted as a complete interruption and barrier to their continuous flow to patients. The movement of such drugs was interrupted, according to the laws of Utah, when they reached the pharmacist's shelf and could begin again only when the physician issued a prescription order calling for them.[15]

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[13] T.S., I, 4, 5, 7; Defendant's Exhibits, C, D, E, F, X.

[14] Complaint, pp. 3-4.

[15] See Footnote 8, *supra*.

The Learned Profession of Pharmacy

A second jurisdictional issue in this case concerns the effect on the case of the status of the Utah pharmacist as a member of a learned profession. The pharmacy laws of the State of Utah recognize pharmacy as a profession and the plaintiff has admitted that a pharmacist in dispensing a prescription is engaged in the practice of a learned profession.[16] The pharmacy laws of Utah also provide that every applicant for a license to practice pharmacy in the State must have professional educational attainments and practical knowledge of the practice of the profession.[17]

The defendant pharmaceutical association was and is a professional association one of whose purposes is the elevation of the standard of professional thought in pharmacy in the State of Utah.[18]

As provided by the laws of the State of Utah, only registered pharmacists or certificated pharmacy internes under their immediate personal supervision may receive money from patients for prescription drugs.[19]

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[16] T.S., I, 10; Defendant's Exhibit F, "Laws Affecting Pharmacists" issued by the State of Utah Department of Registration, *infra*, p. 4, Sec. 58-17-2.8.

[17] Defendant's Exhibit F, *infra*, p. 3, Sec. 58-17-2; See also additional Trial Stipulation X which sets forth the responsibilities and procedures taught in pharmacy schools to be followed by pharmacists in filling a prescription, one or more of which responsibilities and procedures the pharmacist carries out in filling or dispensing every prescription.

[18] Defendant's Exhibit A, *infra*, p. 3.

[19] Defendant's Exhibit F, *infra*, p. 8, Sec. 58-17-10.

Conspiracy

One of the fundamental issues involved in this case is whether the existence of the conspiracy alleged[20] was proved as a matter of law.

One of the defendant's activities complained of in this connection was the mailing to all pharmacies in the State of Utah of copies of a particular prescription pricing schedule, and revisions thereof, prepared by the University of Utah College of Pharmacy and the distribution of a copy of such schedule free to any person asking for it.[21] In connection with such distribution statements were made to the members of defendant urging that such schedule be "used" by them. Basically, the issue of conspiracy turns on the determination as to whether such members were urged to "use" such schedule as a mechanical means, in whole or in part, in the calculation of prescription prices, or whether such members were urged to "use" such schedule as a guide or suggested means of calculation.[22]

Within the profession of pharmacy in the State of Utah, and in accordance with the teaching materials employed by the University of Utah College of Pharmacy,[23] registered pharmacists have used prescription

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[20] Complaint, pp. 4-5.

[21] T.S., I, 12; IV, 1, 18, 41; Plaintiff's Exhibit 23; Defendant's Exhibit D; T.S., IV, 10; Plaintiff's Exhibit 17-B, 49, 51, 52.

[22] See Deposition of Albert Veltri, pp. 18, 30-31.

[23] Defendant's Exhibit L, Martin, *et al.*, ed. *Remington's Practice of Pharmacy*, 12th Ed., Mack Pub. Co., Easton, Pa., 1961, pages 1535, 1572, 1573. This volume is a standard textbook used in colleges of pharmacy throughout the United States, including the State of Utah; and illustrates the manner in which the use of prescription pricing schedules is taught.

pricing schedules as aids or guides in the calculation of total prescription charges.[24] Many such prescription pricing schedules, which are identical in character to those directly involved in this case, have been available for use and used by registered pharmacists in Utah. Prescription pricing schedules have been used by many pharmacists in the practice of pharmacy since 1828.

Notwithstanding that the conspiracy was alleged to have existed continuously from about the fall of 1954[25] and that as of December 31, 1960, 353 of the 610 resident registered pharmacists in Utah actively practicing their profession, or about 57.87%, were "Active Members" of the defendant and therefore entitled to vote or to participate in its management[26] no uniformity of prescription pricing was observed during the period beginning January, 1960, and continuing through the date of the filing of the Complaint on March 7, 1961.[27] Such period represents about the last fourteen months of the estimated seventy-eight months during which the conspiracy was alleged to have been in existence.

Rule of Reason

Correlative to the questions as to whether the existence of the alleged conspiracy was proved, is the further question as to whether defendant's actions were justified under the so-called "Rule of Reason"[28] as being reasonable efforts to induce self-regulation in

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[24] T.S., 1, 11, 12, 42; Defendant's Exhibits Y, CC-KK, incl.

[25] Complaint, pp. 4-5.

[26] T.S., 1, 1, 33, 35; cf. Defendant's Exhibit Q.

[27] R., 44, 46-48; Defendant's Exhibit O-O.

[28] *United States* v. *Columbia Pictures Corporation*, 189 F.Supp. 153 (D.C., S.D., N.Y., 1960); *United States* v. *Morgan*, 118 F.Supp. 621 (D.C., S.D., N.Y., 1953); *Appalachian Coals* v. *United States*, 288 U.S. 344 (1933); *Board of Trade* v. *United States*, 246 U.S. 231 (1918).

prescription pricing among registered pharmacists in the State of Utah.

It is commonly known and the evidence showed that pharmacists in Utah generally dispense hundreds of prescriptions daily and consequently for some time have had a basic need for a type of prescription pricing aid which at a glance would assist them in determining the proper charge for each prescription dispensed to a patient. Specifically, they have had a need for a pricing aid which would assist them in calculating total charges or prices for prescriptions while at the same time assuring that included in such total charges or prices there would be a charge or price increment representing a reasonable fee for their individual professional services. The pricing schedules directly involved in this case reflect such an increment in terms of a professional fee and there have been many prescription fee schedules, identical in character to the schedules in this case, available for use as the pharmacist saw fit in his practice, throughout the United States, including Utah.[29] The use of prescription fee schedules as guides to calculation in pricing has been a subject of instruction in a standard textbook used in colleges of pharmacy in the United States, including the University of Utah College of Pharmacy.[30]

Considering the need for, the use of, and the established professional education in the use of prescription fee schedules as the background and context of this case, the Court's attention is invited to certain representations made to members of the defendant concerning schedules of this type. In June, 1955, for instance,

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[29] T.S., I, 11, 12, 42; Defendant's Exhibits Y, CC-KK, incl.

[30] Defendant's Exhibit L.

the pricing schedule involved in this case was represented as a means by which the individual pharmacist could establish uniformity in his professional fees for dispensing prescriptions, in the manner the doctor, dentist, architect, and engineer each establishes uniform fees for his services in the practice of his profession.[31] In January, 1959, it was represented to be a fact that pharmacies paying the better salaries invariably were the ones using some standard prescription pricing schedule and ten of such schedules were named, including the schedule involved in this case which was represented to be the best of all for Utah.[32] As represented on May 11, 1960, finally, a prescription pricing service prepared for the defendant by the University of Utah College of Pharmacy was offered for sale at $5.00 a set,[33] and it was represented to the individual subscribing to the service who enclosed his check for $5.00 payable to the College of Pharmacy therefor that such service might assist him in his prescription pricing and assure him of speed and uniformity.[34]

Scope of Judgment

Ancillary to each of the questions presented herein is the common question as to whether the broad scope of the final judgment of the court below was proper.[35]

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[31] T.S., IV, 42; Plaintiff's Exhibit 5.

[32] T.S., IV, 35; Plaintiff's Exhibit 91.

[33] T.S., I, 43; Plaintiff's Exhibit 52; Defendant's Exhibit R.

[34] Defendant's Exhibit R.

[35] Defendant's Memorandum And Recommendations To The Court Relative To The Proposed Judgment.

THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

Important and Unsettled Federal Questions, Concerning the Application of Section 1 of the Sherman Act to Practicing Pharmacists Throughout the United States, Should Be Settled by the Pronouncement of This Court.

The basic questions presented in this case are identical to those currently involved in three cases now pending in United States District Courts in three different states,[36] and to those involved in one case recently decided by the United States Court of Appeals for the Ninth Circuit, in which the Petition for a Writ of Certiorari was filed with the Court this date.[37] Each of the foregoing cases arises under Section 1 of the Sherman Act[38] and each draws in question the jurisdictional reach of the Sherman Act and its application to the learned profession of pharmacy.

The Judgment of the Court Below Declaring That a Flow of Interstate Commerce Was Present and That the Questioned Activities of the Appellant Affected Interstate Commerce Misapplies Controlling Principles Previously Announced by This Court.

The first question presented herein has been raised by the defendant's contention that the court below lacked jurisdiction over the subject matter in the absence of

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[36] *United States* v. *Northern California Pharmaceutical Association and Donald K. Hedgpeth*, Civil Action No. 39629, U.S.D.C. N.D. Cal., S.D.; *United States* v. *Arizona Pharmaceutical Association, Maricopa County Pharmaceutical Association, and Tucson Pharmaceutical Association*, Civil Action No. 3367-Phx., U.S.D.C. D. Ariz.; and *United States* v. *Idaho State Pharmaceutical Association, Inc.*, Civil Action No. 3654, U.S.D.C. D. Idaho, S.D.

[37] *Northern California Pharmaceutical Association and Donald K. Hedgpeth* v. *United States*, C.A. 9th, decided June 27, 1962.

[38] 15 U.S.C. Section 1.

interstate commerce in the case. Such absence of interstate commerce is indicated on the face of the Complaint itself in view of the conspiracy alleged being to establish and maintain uniform prices for prescription drugs dispensed to consumers in the State of Utah.[39] The Complaint alleged that the defendant conspired to restrain interstate commerce in prescription drugs, that is, commerce in dispensing transactions between registered pharmacists in the State of Utah and consuming patients to whom such pharmacists dispense prescriptions. Accordingly, it is at such point at which the restraint or pinch was alleged to be directed that interstate commerce must be found.[40]

The Court, however, recently stated in *Eli Lilly And Co.* v. *Sav-On-Drugs, Inc.*[41] that such transactions between pharmacists and patients take place solely in intrastate commerce insofar as concerns the exercise of a state's police power, and it is the defendant's view that, notwithstanding the full reach of Congress's power under the Commerce Clause[42] as involved in the application of the Sherman Act to this case,[43] the Court's observation in *Eli Lilly And Co., supra,* may be accepted critically as a proper recognition of the absence of interstate commerce in transactions involving prescription drugs for the purposes of the Sherman Act.[44]

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[39] Complaint, p. 4.

[40] *United States* v. *Women's Sportswear Mfrs. Asso.*, 336 U.S. 460, 464 (1949).

[41] 366 U.S. 276, 278 (1961); reh. den. 366 U.S. 978 (1961).

[42] Constitution of the United States, Art. I, Sec. 8.

[43] *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495 (1940).

[44] *United States* v. *South-Eastern Underwriters Asso.*, 322 U.S. 533, 545 (1944).

As additional authority persuasive in this case, the Court's attention is invited to the decision of the Ninth Circuit Court of Appeals in *Page* v. *Work*.[45] The Court there held that the laws of the State of California, in providing for the local regulation of legal advertising, effectively created a relevant market in legal advertising which was solely in intrastate commerce. The defendant herein contends that the laws of Utah similarly created a wholly intrastate "market" in prescription drugs which never entered the channels of interstate commerce.

The Court should declare whether Utah through its pharmacy laws governed the conduct of the persons and the movement of drugs within the state in such a manner as to make such conduct and the movements of such drugs take place wholly in intrastate commerce. The Court's determination of such matter would provide a fundamental interpretation of the Sherman Act as based on the facts in this case.

In *United States* v. *Sullivan* this Court upheld the power of Congress under the Commerce Clause to provide in the Federal Food, Drug, and Cosmetic Act that the sale of a prescription drug, as opposed to its proper dispensing pursuant to a prescription, after shipment in interstate commerce is a criminal act of misbranding.[46] This Court now should determine whether the Sherman Act extends beyond the event considered in *Sullivan* (misbranding as a result of a sale of a prescription drug) and regulates the dispens-

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[45] 290 F.2d 323 (C.A. 9th, 1961); cert. den. 368 P.S. 875 (1961).

[46] *United States* v. *Sullivan*, 332 U.S. 689 (1948); Act of Congress of June 25, 1938, c. 675, 52 Stat. 1040, *et seq.*, as amended 21 U.S.C. 301, *et seq.*

ing of a prescription by a pharmacist to a patient, a wholly intrastate activity.

In connection with the question of whether the flow of interstate commerce was present in the case, it should again be noted that there was not present in the case any final question as to whether the activities of the defendant affected interstate commerce and the trial court committed error in its opinion when it stated the defendant's activities affected interstate commerce, first, because the plaintiff conceded, as it had conceded in *United States* v. *Northern California Pharmaceutical Association, supra,* that the case was based solely on the existence of a flow of interstate commerce and, second, because the trial court did not find the defendant's activities had a direct, substantial, and harmful effect on interstate commerce, all of which elements are prerequisite to an unlawful effect on interstate commerce.[47]

The Court Should Determine Whether the Practice of Pharmacy in Utah, as Delineated in the Complaint, Constitutes a Learned Profession, and, If So, Whether the Activities of the Appellant Were Within the Purview of Section 1 of the Sherman Act.

The second question presented herein concerns the doubted jurisdiction under the Sherman Act of the court below over the practice of the learned profession of pharmacy. The question has arisen as a result of the defendant's distributing to persons in Utah copies of a suggested prescription pricing schedule prepared

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[47] R., p. 250; *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 297 (1945).

for it which reflects in each of its total figures a certain charge above ingredient cost as consisting of a charge for the professional services of the pharmacist rendered in the dispensing of the prescription drug involved. Two pharmacists strictly following such schedule for the mechanical calculation of the total charges to the patient for two prescription drugs of identical dosage and strength, whose costs for the ingredients of such prescription drugs were identical with a particular round number cost indicated on the schedule, would make identical charges to the patient for the professional services of each rendered in dispensing such prescription drugs and the total prescription drug charges of both would be identical.

The theory of the plaintiff's case is that the proposition of the "use" of such a schedule from which uniform pricing of prescription drugs could result is of itself a violation of both the spirit and letter of the Sherman Act. It has been the defendant's view that such a schedule which purports to suggest standards of professional fees for pharmacists' services in a manner identical to that in which the professional fees of attorneys and physicians are suggested in publications of their respective professional associations,[48] and activities of the defendant concerned with its distribution and use, constitute at their most a restraint on the practice of pharmacy as a learned profession[49] and therefore constitute a restraint which Congress neither intended

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[48] Def. Ex. G, H, I.

[49] *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435-436 (1932).

to place nor placed within the jurisdiction of the Sherman Act.[50]

The question of whether members of a learned profession such as that of pharmacy may lawfully propose that their brothers regulate themselves in the calculation of professional fees without violating the provisions of the Sherman Act has never been properly before the Court and decided.[51] The question should be settled in this case, however, because of its direct effect upon a healing arts profession having a long-established nexus with the practice of medicine and accordingly because of its relationship to basic considerations affecting the public health.[52] The Court should declare whether or not the suggestion within the profession as to what constitutes reasonable compensation for the pharmacist's services violates the Sherman Act. All practicing pharmacists in the United States, not just those in the States of Arizona, Idaho, and California where cases have arisen involving issues similar to those in this case, are asked each day to place their hands on the very lives of patients who come to them for prescription drugs. The solemn burden resulting from such responsibility should be borne by only those persons of the highest ethics, reliability, and competence and the Court should declare whether they

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[50] *United States* v. *American Medical Ass'n*, 28 F.Supp. 752 (1939); cert. den. 308 U.S. 599-600 (1939); cf., *Ibid*, 110 F.2d 703 (1940); cert. den. 310 U.S. 644 (1940); 130 F.2d 233 (1942); aff'd 317 U.S. 519 (1943).

[51] *United States* v. *National Asso. R.E.B.*, 339 U.S. 485, 491-492 (1950).

[52] *Semler* v. *Oregon State Bd. of D. Examiners*, 294 U.S. 608, 612 (1935); *United States* v. *Oregon State Medical Soc.*, 343 U.S. 326, 336 (1952).

may be induced and encouraged to bear such a burden by the prospect of reasonable compensation for their services as encouraged within their profession.

It Is Important That the Court Declare Whether Proof of the Publication and Distribution of a Particular Prescription Pricing Schedule, Standing Alone, Establishes a Violation of Section 1 of the Sherman Act.

The third question presented herein, based on the assumption that restraints on the practice of learned professions are not *per se* outside the jurisdiction of the Sherman Act, concerns whether the evidence showed the defendant conspired to establish and maintain uniform prescription pricing in the State of Utah. There is no question in the case that the defendant did distribute a particular prescription pricing schedule under its corporate name to many persons practicing pharmacy in the State of Utah. The parties are at issue, however, as to whether certain representations, attributed to the defendant, that such schedule be "used" showed (from the plaintiff's point of view) that the defendant was proposing such schedule as a means of mechanical calculation in prescription pricing, or (from the defendant's point of view) that the defendant was proposing such schedule as a guide or suggestion, something to stimulate thought about standards of professional fees in pharmacy. The controversy as so drawn presents important questions with regard to the inferences which may be drawn from circumstantial evidence related to possible conspiratorial activity to fix prices by the use of pricing schedules.

In a recent case never brought before the Court for review, the distribution of a pricing schedule was decided to be integrated with a price-fixing conspiracy because evidence additional to that showing the fact of

distribution established the existence of an agreement among the parties to use such schedule as a starting point in pricing.[53] The Court, however, has affirmed at least one case in which the existence of a conspiracy and agreement to fix prices was inferred from the publication, adoption by the corporate membership in convention, and agreement to circulate a particular pricing schedule to all the corporate membership.[54]

The case now before the Court is distinguishable from the two cases cited above because the only two facts which appear from the evidence herein are that the defendant caused to be published and caused to be distributed a particular pricing schedule. There is absent from the evidence proof of adoption of such schedule by the defendant's membership and there is no proof independent of such mere publication and distribution that the schedule was circulated pursuant to an agreement to fix prescription pricing. Yet the plaintiff herein urged at the trial that *prima facie* the inference be drawn that the mere publication and distribution of such schedule by the defendant showed the defendant conspired to establish and maintain uniform prescription drug pricing[55] and the evidence indicates that judgment in fact was rendered against the defendant solely upon the proof of publication and distribution referred to above and absent any adequate additional showing from which could be inferred the existence of a price-fixing conspiracy.

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[53] *Plymouth Dealers' Ass'n of No. Cal.* v. *United States*, 279 F.2d 128, 132 (C.A. 9th, 1960).

[54] *United States* v. *Nationwide Trailer Rental System, Inc.*, 156 F.Supp. 800, 804; aff'd *per curiam*, 355 U.S. 10 (1957).

[55] R., pp. 21-22, 151-156.

In view of the fact that as near as can be ascertained all schools of pharmacy throughout the United States teach their students how to "use" a prescription pricing schedule,[56] that since 1828 prescription pricing schedules have been "used" by most practicing pharmacists, that today there are many prescription pricing schedules available for "use" and "used" by pharmacists,[57] and that at least five pharmaceutical associations other than the defendant, and one practicing pharmacist, have been brought before federal courts in cases arising under the Sherman Act for distributing particular prescription pricing schedules and urging their "use",[58] the Court should decide whether the mere publication and distribution of such a schedule by the defendant constituted of themselves adequate circumstantial evidence proving the existence of a price-fixing conspiracy, or whether and to what extent such activity plus the invocation of the "use" of such schedule supported the inference that such a conspiracy existed. Since there is a real need within the profession of pharmacy for the use of suggested prescription pricing schedules to aid pharmacists in pricing literally thousands of individual prescriptions on a daily basis while at the same time maintaining reasonable standards of professional fee computation in the course of such pricing, such a decision would indicate to the defendant and other pharmaceutical associations, on the facts in this case, in what manner they must harmonize or have harmonized their activities, in behalf of such need of members of the profession, with the provisions of the Sherman Act.

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[56] T.S., I, 12.

[57] T.S., I, 11.

[58] See footnotes 36, 37.

The Applicability of the So-Called "Rule of Reason" to the Activities of the Appellant, as Reasonable Efforts to Induce Regulation in Prescription Pricing Within Pharmacy, Is Correlative to the Issue of Conspiracy and Should Be Determined at This Time.

The fourth question presented herein concerns whether the defendant's activities in connection with the distribution of a particular prescription pricing schedule were merely part of a plan to induce self-regulation of fees within the profession of pharmacy and therefore justified under the provisions of the Sherman Act.

The Court has stated before that the true test of the legality of conduct under the Sherman Act is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition.[59] Such a test envisions conduct which may affect competition not only affirmatively or negatively but which also may be neutral in its effect on competition. It is the defendant's view that its activities which were drawn in question in the court below had or could have only such a neutral effect accompanied in the long run by an indirect promotion of competition within the profession of pharmacy.

In proposing the use of the pricing schedule bearing its name as a suggestion or a guide, assuming the truth of the defendant's contention with regard to the correlative question of conspiracy herein, the defendant is represented in the evidence as purporting to raise the level of professional compensation of all practicing pharmacists throughout the State of Utah. It is apparent that if such an increase did occur it would be re-

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[59] *Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918).

fleeted in the same marginal increase in total charge for a particular prescription dispensed by any given pharmacist in the state and the relative prescription pricing among all pharmacies in the State of Utah would remain the same, leaving prescription pricing competition among them unaffected. Over a relatively long period of time such a raising of the level of pharmacists' professional compensation could be expected increasingly to draw within the profession those persons who by their energy and initiative best practice pharmacy as a competition in speedy and complete service to the patient rather than solely as a competition in pricing, and thereby would stimulate ethical competition within pharmacy as a whole within the state.

The Court should resolve in this case whether the defendant engaged in activities, insofar as drawn in question, which were or could have been only neutral in their direct effect on competition within the profession of pharmacy and therefore were consonant with that policy favoring reasonable competition embodied in the Sherman Act.[60] The resolution of such question would have the effect, beyond determining the defendant's rights in the present case, of deciding in large part the underlying issue of whether pharmaceutical associations as a whole may lawfully purport to induce self-regulation in the calculation of professional fees within pharmacy as do medical and legal professional associa-

[60] *Board of Trade, supra; Appalachian Coals* v. *United States*, 288 U.S. 344, 374 (1933); *United States* v. *Morgan*, 118 F.Supp. 621, 688-689 (D.C.S.D. N.Y., 1953); *United States* v. *Columbia Pictures Corp.*, 189 F.Supp. 153, 178 (D.C.S.D. N.Y., 1960); *Roofire Alarm Co.* v. *Royal Indemity Co.*, 202 F.Supp. 166, 169 (D.C.E.D. Tenn., S.D., 1962); *John Wright & Associates, Inc.* v. *Ullrich*, 203 F.Supp. 744, 750-751 (D.C.D. Minn., Third D., 1962).

tions within medicine and law and thereby seek to benefit the profession and the patient.

The Court Should Decide Whether the Broad Scope of the Judgment of the Court Below Is Violative of the Fourth Amendment to the Constitution of the United States.

Ancillary to each of the questions presented herein is the common question of whether the broad scope of the final judgment of the court below was proper. The defendant questioned the broadness of the final judgment during the period of its formulation by the court below.[61] The Court should declare whether such judgment would allow unreasonable searches and seizures[62] as to the defendant, which substantial question must be answered not only because of its basic Constitutional nature[63] but also because of its relation to prospective burdens on the defendant.[64]

[61] Defendants Memorandum And Recommendations To The Court Relative To The Proposed Judgment.

[62] Constitution of the United States, Amendment IV.

[63] *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944).

[64] *United States* v. *Blok*, 188 F.2d 1019 (C.A.D.C., 1951); *United States* v. *International Nickel Co. of Canada, Ltd.*, 203 F.Supp. 739 (D.C.S.D. N.Y., 1962).

CONCLUSION

This appeal involves questions the final resolution of which will affect the entire profession of pharmacy in the United States. It is respectfully submitted that the questions presented are so substantial as to require plenary consideration, with briefs and oral argument, for their resolution.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

No. C 30-61

UNITED STATES OF AMERICA, *Plaintiff*,

v.

UTAH PHARMACEUTICAL ASSOCIATION, *Defendant*.

Memorandum Decision

Lyle L. Jones, San Francisco, California; Don H. Banks, San Francisco, California; Gilbert Pavlovsky, San Francisco, California, and William T. Thurman, Salt Lake City, Utah, for the plaintiff.

Arthur B. Hanson, (Hanson, Hanson and Cobb) Washington, D. C., and Charles Welch, Jr., Salt Lake City, Utah, for the defendant.

CHRISTENSEN, J.

The United States of America, as plaintiff, seeks an adjudication that the defendant, Utah Pharmaceutical Association, has engaged in activities which have violated Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, and enjoining by decree of court the continuation of these activities.

The defendant is a nonprofit corporation, organized under the laws of the State of Utah, with its principal place of business at Salt Lake City. Its membership until 1959 was comprised largely of drugstore owners and managers, but in that year it limited its active members to registered pharmacists. At the end of 1960 a majority of the pharmacies of the State were represented in the Association by either their owners or their managers.

Plaintiff charges that a conspiracy was entered into among the Association and its officers, directors and mem-

bers, to fix and control the prices of prescription drugs for retail sale, through the establishment, adoption, distribution and promotion of a pricing schedule which had the effect of fixing prices. Defendant denies that there was any such unlawful conspiracy and further denies that interstate commerce was affected by any pricing schedule or that there was an unreasonable restraint of trade or commerce, as distinguished from a reasonable exchange of information among pharmacists as members of a learned profession.

Through pre-trial proceedings, with the cooperative diligence of able counsel, most of the facts of the case have been stipulated. Consequently, the actual trial of the case required less than a day. Attention, therefore, may be focused mainly upon the important legal principles involved, although there must be some findings of ultimate fact made by the Court upon the basis of inferences to be drawn from the stipulated facts, the documents received in evidence and brief testimony and a deposition received in open court.

Upon the threshold of decision, I am confronted by certain objections reserved by the respective parties to certain stipulated facts and documents, based mainly upon the ground of their alleged immateriality or irrelevancy, and, in some instances, on the claim of incompetency or hearsay. To facilitate the trial and to permit the Court to consider these problems upon final submission, as against the background of all of the evidence, counsel agreed that the ruling of the Court could be reserved, for consideration upon final submission.

In general the objections which the plaintiff urges are to matters of which the Court could take judicial notice anyway. In a case before the jury they might involve needless irrelevancy, but for the most part constitute background circumstances concerning the profession of pharmacy and other professions and activities which could in some aspects

assist, and would in no instance preclude, a proper resolution of the issues before the Court sitting without a jury. Accordingly the plaintiff's objections are overruled.

I see no merit to the defendant's objections to paragraph 3, 22, 25, 26 and 27 of Section I of the pre-trial stipulation, nor to paragraphs 19, 21, and 23, section IV. The defendant's general objection to paragraphs V and VI also are overruled. Facts concerning the organization of local associations under the sponsorship or with the cooperation of the defendant and statements appearing in The Utah Pharmaceutical Association Bulletin News, the official publication of the defendant, are deemed admissible to the extent offered for such light as they may throw on the issues before the Court. The objection to paragraphs 7, 8 and 9 of Section I, is overruled, since what happens to drugs before they reach a Utah pharmacy was relevant to plaintiff's theory of the case with reference to the element of interstate commerce. Defendant's objections to Section II of the stipulation also are overruled.

I entertain doubts as to the admissibility of exhibits 53, 53a and 53b, in view of the hearsay nature of detailed answers from various persons throughout the State, and therefor sustain the defendant's objection thereto. With respect to the other exhibits to which objection is made by the defendant, they are received for such light, if any, that they may throw upon the question of a conspiracy. Most of them are extracts from the official publication of the defendant Association distributed among its officers and directors and to its members. At least they constitute information coming to the attention of the Association, or its own representations and claims, which presumably also come to the attention of its officers, directors and members. In some instances they may be considered admissions, and in others they come within the doctrine of Hitchman Coal & Coke Co., v. Mitchell, 245 U.S. 229, 38 S. Ct. 65, 62 L. Ed. 260 (1917). When persons associate themselves together

in the prosecution of a common plan or enterprise, lawful or unlawful (such association being established by independent evidence), from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, may be considered the act of all and admissible as primary and original evidence.

We do not reach, upon the question of admissibility, the full force of the latter doctrine since the evidence coming from the official publication of the association is not introduced to connect any other particular party to the conspiracy or to hold other parties responsible for the declarations of the Association. To the extent, however, that the evidence establishes declarations of local Associations, I have deemed most of these sufficiently connected up on the question of the use of the price schedule with the activities and objectives of the defendant Association to be admissible against it. However, this has not been a determinative factor; my findings would have to be the same even though I should entirely disregard any declarations or activities of local associations as shown by the evidence.

Passing now to the merits, the four determinative questions in the case are:

I. Is the restraint alleged in the complaint, to the extent supported by the evidence, one which is in restraint of trade or commerce *among the several states* within the purview of Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1[1]

II. Does the fact that a pharmacist in filling a drug prescription is engaged in the practice of a learned profession immunize the defendant from the reach of the Act?

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[1] Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States, . . . is declared to be illegal. . . ."

III. Has the defendant, with its officers, agents and members, or some of them, conspired to fix charges for the dispensing of prescription drugs within the prohibitions of the Act?

IV. Is such conspiracy, if any, a per se violation of the act, or does it constitute a reasonable restraint of trade acceptable under the anti-trust laws?

I

The government relies upon two legal theories to sustain its jurisdictional position that interstate commerce is involved: (1) That the alleged conspiracy impinged upon goods or services in the flow of interstate commerce and, (2) that the unlawful activities of the Association substantially affected interstate commerce, citing Swift & Co. v. United States, 196 U.S. 375, 25 S. Ct. 276, 49 L. Ed. 518 (1905), United States v. General Motors Corporation, 121 F. 2d 376 (7 Cir. 1941), Motion to withhold the order denying petition for cert. granted 314 U.S. 579, 62 S. Ct. 124, 86 L. Ed. 469; cert. den. 314 U.S. 618, 62 S. Ct. 105, 86 L. Ed. 497; reh. den. 314 U.S. 710, 62 S. Ct. 178, 86 L. Ed. 566; Las Vegas Merchant Plumbers Ass'n v. United States, 210 F. 2d 732 (9 Cir. 1954), cert. den. 348 U.S. 817, 75 S. Ct. 29, 99 L. Ed. 645, reh. den. 348 U.S. 889, 75 S. Ct. 202, 99 L. Ed. 698; Plymouth Dealers' of No. Cal. v. United States, 279 F. 2d 128 (9 Cir. 1960), and United States v. Northern California Pharmaceutical Association (N.D.Cal. 1961) (unpublished). In the latter case the late Judge Goodman took the view in his instructions to the jury that evidence similar to the evidence before me was clearly sufficient to show that the drugs were in the flow of interstate commerce when sold to the public at retail.

United States v. Sullivan, 332 U.S. 689, 68 S. Ct. 331, 92 L. Ed. 297 (1948) is relied upon by the Association to demonstrate that while the power of Congress over interstate commerce may extend to drugs received from inter-

state commerce and held for intrastate retail sale, only by the Federal Food, Drug and Cosmetic Act, and not in the anti-trust laws, has Congress chosen to exercise the full sweep of its powers. Sullivan does, indeed, establish the broad scope of the Congressional power; but the limitations with reference to the anti-trust laws sought to be drawn from this decision were expressly rejected in United States v. Frankfort Distilleries, 324 U.S. 293, 65 S. Ct. 661, 89 L. Ed. 951 (1945), which held that, with regard to commercial trade restraints, Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied. I do not read Eli Lilly & Co. v. Sav-On-Drugs, 366 U.S. 276, 81 S. Ct. 1316, 6 L. Ed. 2d 288 (1961) reh. den. 366 U.S. 978, 81 S. Ct. 1913, 6 L. Ed. 2d 1268, and the other cases cited by the defendant as militating against the reach of the anti-trust act under the facts of the present case, because either different legal questions, or significantly different factual situations, were there involved. Nor do I think that the statutes of the State of Utah which regulate the practice of pharmacy set up an effective "barrier" to the application of the Sherman Act in this case, as suggested by the defendant.

Approximately ninety percent of the prescriptions dispensed by pharmacists in the State of Utah during the period covered by the complaint consisted of drugs which were sold without additional pharmaceutical manipulation by the pharmacist. An article which appeared in the Utah Pharmaceutical Association Bulletin News in July 1956 represented that of over sixteen thousand new prescriptions which were analyzed and which were filled during the calendar year 1955, only four percent required compounding. Most of the drugs used to fill prescriptions in the State of Utah are manufactured outside the State and are shipped from the place of manufacture either to wholesale drug firms located in the State of Utah or directly to pharmacists within the State.

The most common purchase of drugs by pharmacists is in quantities of 25, 50, 100, 500, and 1000, and are received by the pharmacists in the original package or container of the manufacturer. After the pharmacist calculates the price of the prescription, he is required by the State to collect a sales tax which is applied to the total price charged for the prescription. The pharmacist, in a sense, acts as a conduit and delivers the drugs from their actual interstate movement to the consumer. Indeed, as a practical matter, with respect to the type of drugs requiring prescriptions, he is the sole conduit from sources outside the State of Utah to the consumer. The dollar value of prescription drugs dispensed to consumers in Utah by members of the defendant Association was substantial during the period covered by the complaint.

It is concluded that the questioned activities of the Association affected interstate commerce and that the goods involved were in the flow of interstate commerce at the time with which we are concerned.

II

The fact that a pharmacist in filling a prescription is engaged in the practice of a learned profession does not immunize the defendant from the application of Section 1 of the Sherman Act.

Defendant seeks to state this issue in the form of two mutually exclusive alternatives: Is the dispensing of prescriptions the practice of a learned profession, or is it the retail sale of a commodity in commerce? But the mere circumstance that goods in commerce are treated or handled by, or otherwise connected with, a learned profession does not remove the goods themselves, nor transactions affecting them, from the applicability of the Sherman Act. This is made plain by the decision of the Supreme Court in American Medical Ass'n v. United States, 317 U.S. 519, 63 S. Ct. 326, 87 L. Ed. 434 (1943); and the other cases cited

by the defendant, Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S. Ct. 570, 79 L. Ed. 1086, (1935); United States v. National Ass'n of Real Estate Bds. 339 U.S. 485, 70 S. Ct. 711, 94 L. Ed. 1007 (1950), and United States v. Oregon State Medical Soc., 343 U.S. 326, 72 S. Ct. 690, 96 L. Ed. 978, (1952), do not throw this proposition into question. It is true that in the latter case the findings of the trial court that neither a conspiracy nor interstate commerce was shown on the facts was sustained by the Supreme Court, but this was upon the ground that the trial court's findings were not "clearly erroneous". In no way did that decision indicate that members of a learned profession were any more at liberty to restrain interstate trade in goods than any other class of persons. And in United States v. National Ass n of Real Estate Bds. supra, the Supreme Court held that the anti-trust act may reach unlawful conspiracies to restrain services as well as with respect to goods in interstate commerce.

We, however, are not here concerned with merely services, but with the drugs themselves. In view of this, the fact that fee schedules sponsored by associations of doctors and lawyers are not uncommon is of little persuasion, since their involvement with interstate commerce is questionable, and particularly because they relate entirely to professional services as distinguished from the pricing of goods or commodities. What the result would be if a fee schedule of doctors or lawyers covered the sale of commodities as a part and parcel of the medical or legal transaction for which the fee was fixed under the schedule is unnecessary to decide here. But it is clear that this would put a different complexion upon the related activities of an association in that connection.

There might be some legitimate argument whether the use of the schedule for the pricing of prescription drugs was reasonable if the schedules primarily dealt with matters

other than the price of drugs, or if their major concern or effect was with reference to services rather than drugs. It, however, is apparent that the factor of services in going to make up the schedule is considerably less determinative than wholesale drug prices. Nor does the schedule purport to regulate the compensation of pharmacists employed by a drugstore, but only the gross return of the store for the dispensing of the drugs. There could be many better means for dealing primarily with the price or cost of the services of a professional pharmacist without involving an agreement for the uniform pricing of the drugs themselves. As shown by the evidence the process of determining the prices of drugs, pursuant to the schedule with which we are concerned, involves merely the ascertainment of the wholesale cost per one hundred of the item in question, and, upon the basis of this, a reading from the schedule of the retail price of the particular prescription drug.

If, by commingling service factors with other bases of price control, agreements to fix prices could be legalized, there are few businesses that could not incorporate by some means a professional or other service factor in their pricing schedules and thus insulate their otherwise illegal agreements from the reach of the anti-trust laws.

III

Direct and independent evidence of an established purpose, policy and project of the defendant Association, and stipulated facts and exhibits that are clearly admissible as acts and declarations in furtherance of the objectives of the Association, leave no room for doubt that the officers and directors, with the intent of establishing uniform prices for prescription drugs within the State of Utah to the extent of their ability, adopted a pricing schedule and successive revisions, distributed them to members throughout the State and urged and induced the members to use

the schedule for the pricing of prescription drugs. It also is fairly to be inferred, from a preponderance of the evidence, that officers of the Association among themselves agreed to foster and promote the schedules as a part of the Association activity and to utilize such schedules in the carrying on of their own businesses.

The fact that some, or all, of the members had access to and, to an extent, from time to time may have used, pricing schedules other than those adopted and distributed by the Association does not militate against the conspiracy nor the intent of the Association to promote the use of its schedule to stabilize prices on that particular basis. And the preponderance of the evidence indicates that the Association schedule was the most effective one for establishing uniformity of prices to the degree which has been achieved. The Association in its Bulletin from time to time expressed gratitude "for the opportunity to comment on the schedule and to urge its use by the pharmacists of the State." It was said that "adopting it really paid off." It was suggested "that through your organization every pharmacist accept the pricing schedule and adhere to it." It was remarked that "the boys are using it." If we discount these and similar statements as partly promotional rather than factual in nature, yet the agreement and intent remain; it is undeniable that the activities of the Association have had some substantial effect, if that were necessary, in encouraging and promoting uniformity of drug prices within the State.

Plymouth Dealers' Ass'n of No. Cal. v. United States, supra, 279 F. 2d 128 (9 Cir. 1960) held that the adoption, publication and distribution of the price schedule, with an intent to promote price uniformity, was a per se violation. This at least must be so, and it is enough to characterize the present case in view of its own facts without going to the extent of United States v. Nationwide Trailer Rental System, 156 F. Supp. 800, (D.C. Kan., 1957); Aff'd. 355

U.S. 10, 78 S. Ct. 11, 2 L. Ed. 2d 20, which indicates that with such adoption, publication and distribution shown, no proof would be necessary of an intent to fix prices or an agreement to adhere thereto.

IV

Having determined that the defendant was a party to a conspiracy to fix prices in restraint of commerce there remains for inquiry the issue whether such restraint was a reasonable or otherwise acceptable one under Section 1 of the Sherman Act. The defendant contends that if there were any agreement or understanding it would be an appropriate regulatory matter, long carried on and designed merely to regulate the practice of pharmacy in the public interest and not to fix charges, although resulting in identical charges at times. But no one by continued practice may acquire a vested right to violate the anti-trust laws; and, as we have already seen, one cannot lawfully agree with others to fix the price of goods in commerce merely because of professional credentials or because such price fixing also touches upon the matter of professional fees. The actual effect upon commerce of such price control is not ameliorated by either circumstance.

The defendant Association urges a "rule of reason" upon the basis of Board of Trade of City of Chicago v. United States, 246 U.S. 231, 38 S. Ct. 242, 61 L. Ed. 683 (1918); Appalachian Coals v. United States, 288 U.S. 344, 53 S. Ct. 471, 77 L.Ed. 825 (1933); United States v. Morgan, 118 F. Supp. 621, (S.D.N.Y. 1953), and United States v. Columbia Pictures Corporation, 189 F. Supp. 153 (S.D.N.Y. 1960). These cases do not involve such agreements as this, the established intent of which manifestly was to bring about a uniformity of prices in direct restraint of the competitive trade which the Sherman Act was designed to protect. If there is a per se violation of the act, there would seem to be no "rule of reason" which would excuse

it. Here the per se nature of the violation to preclude the argument of reasonableness is established by the principles of United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940), reh. den. 310 U.S. 658, 60 S. Ct. 1091, 84 L. Ed. 1421, and United States v. Trenton Potteries Co., 273 U.S. 392, 47 S. Ct. 377, 71 L. Ed. 700 (1947).

However, were we authorized to look beyond the per se nature of the violation to the reasonableness of the restraint, we would still be confronted by an unsupportable system. There could not be considered reasonable under any circumstances a conspiratorial agreement, and the distribution and promotion of implementing price schedules, among those in a dominant position in the business and profession of dispensing drugs within the State of Utah, which carried to the extent sought by the Association would almost completely remove price competition in the field of prescription drugs. The good faith and professional standing of those concerned being fully accepted, if such a system were accepted as reasonable, any other similar group of well intentioned men could accomplish the same results in their own businesses through their own associations. This result, with any effective agreement to that end, is unacceptable to the anti-trust laws. It is the duty of a Court to apply these laws in easy cases as well as hard cases, and as against well intentioned parties to an agreement conspiratorial only in law as well as against conspirators in sinister sense which, of course, cannot apply to the parties before the Court. Even under the "rule of reason", as said in Board of Trade of City of Chicago v. United States, supra, "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." The system promoted by the Association does not meet this test, but on the contrary constitutes such a per se violation as to render the test inapplicable.

I conclude that the principles of the cases cited are controlling upon me in the case at bar. There appears to be no process of rationalization, nor no exception or refinement which would sustain the price fixing activities of the Association without being destructive of the foundations of Section 1 of the Sherman Act as confirmed by the decisions of the Supreme Court of the United States. What would be the status of "professional service schedules" as distinguished from "drug pricing schedules" it is unnecessary to determine here. Fully recognizing the professional capacity and services of pharmacists, the conclusion seems inescapable that the schedules in question did not have as their sole or even primary purpose the regulation or stabilization of fees or compensation of members of a learned profession, and, if they did, the pricing of drugs as a commodity was so intermingled and confounded as to invalidate the whole.

The plaintiff is entitled to an adjudication that the pricing activities of the Association as specified above are in contravention of Section 1 of the Sherman Act, and enjoining the continuation of such activities as prayed for in the complaint.

I hereby adopt as my findings of fact the pre-trial stipulations of the parties as qualified and supplemented by the rulings, deductions, inferences and conclusions stated in the foregoing decision, all of which are deemed to be sufficient for the purposes of Rule 51 Federal Rules of Civil Procedure.

The counsel for the plaintiff are directed within a period of ten days to prepare a proposed decree consistent herewith for service upon opposing counsel and lodging with the Court, to be settled upon notice.

Dated this 3rd day of January, 1962.

A. Sherman Christenson
United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Motion for New Trial
No. C 30-61

BEFORE: The Honorable A. Sherman Christenson, United States District Judge

---

UNITED STATES OF AMERICA, *Plaintiff*,

v.

UTAH PHARMACEUTICAL ASSOCIATION, *Defendant*.

REPORTER'S TRANSCRIPT
Salt Lake City, Utah
February 21, 1962

APPEARANCES:

For the plaintiff:

DONALD H. BANKS
Attorney at Law
Department of Justice
969 Flood Building
San Francisco 2, California

For the Defendant:

CHARLES WELCH, JR.
Attorney at Law
Continental Bank Building
Salt Lake City, Utah

Ten o'clock a.m. February 21, 1962

The Court: The question is upon the motion for a new trial in the pharmaceutical association case. You may proceed.

(Arguement by counsel.)

The Court: The case of *Walling* v. *Jacksonville Paper Company*, 317 U.S. 564, and the other Fair Labor Standards Act cases cited in the brief, which present a little more focused argument on interstate matters than had struck me before, probably don't militate against the decision on the interstate commerce phase.

I pointed out in that decision authority supporting the idea that in the antitrust laws Congress exercised its control over interstate commerce in its widest ambit.

A reference to the *Walling* case indicates expressly the difference. Thus, on Page 336 the Supreme Court said:

> "In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states."

Cited legislative history, incidentally, expressing the concern that retailing activities would be interfered with by the Fair Labor Standards Act and other things. And then the opinion goes on:

> "Moreover, as we stated in Kirschbaum v. Walling, Congress did not exercise in this Act the full scope of the commerce power."

So we have on the one hand the Supreme Court saying with regard to the antitrust laws legislation that it did exercise the full scope of its power over interstate commerce, which includes the legislation dealing with activities which not only interfere with the flow of interstate com-

merce, but which affect that flow, and on the other hand, in this line of cases now relied upon primarily by the association, a declaration by the Supreme Court that Congress did not exercise the full scope of those powers. And I think that that indicates the difference in the rulings on this interstate commerce phase.

Not being convinced that I erred, therefore, in my ruling on interstate commerce phase, there being no suggestion of evidence which would change—calculated to change—the basic view of the case, I think the motion could be and it is hereby denied.

Mr. Banks: Your Honor, may I bring one point up at this time? In correcting the final judgment, on Page 4 we were directed to and did change in Line 12 the words "serve to furnish"; and in changing the words "serve to furnish" we failed to change a couple of other words. I don't think they're important, but I just call this to your Honor's attention in case you might want to change them. It's on Line—it's 6 (b). "Defendant Utah Pharmaceutical Association is ordered and directed to furnish a copy of this final judgment." It should be "to" rather than "upon." When we had the word "serve," it was, "serve upon"; and not it would "furnish to each new member thereof," instead of "thereon."

We didn't catch that until just the other day.

The Court: Do you have any objection by interlineation to change that word "upon" on the second one of Subdivision (b) to "to"?

Mr. Welch: That will be all right.

The Court: I'll do that by interlineation, that mere clerical correction.

Mr. Banks: We have "thereon," and it should be "thereof." Does your copy read "thereon," or "thereof"?

The Court: "Thereof."

Mr. Banks: "thereof" is correct. This is one of our own errors.

The Court: Is there anything further?

Mr. Welch: Yes, Sir. May I in respect to this same matter call the Court's attention to the fact that under 6 (a) the defendant is required within 30 days to mail to each of its members a copy of the final judgment. Now, I have some concern about this matter, in this respect, and I wanted to mention it in the presence of Mr. Banks.

Now, we have no objection to proceeding at this time to mail out a copy. We do not want to disregard the order of the Court, but as we feel at this time that we will take an appeal, we don't want the matter that we mail this out to these members at the present time to in any way prejudice our appeal; and we'd just like to bring that to the Court's attention at this time.

The Court: The record may so show that it's intended to be and certainly is without prejudice to the merits of appeal.

Mr. Welch: Thank you.

The Court: You're not asking for a stay, but you want it clear that you're not waiving your objection to the judgment?

Mr. Welch: That's the point.

The Court: The record may so show. I notice that the last page of the judgment, as it appears in the file, is inserted after the certificate of service. I'll ask the clerk to change that order, to put it before the certificate of service. So that it will follow immediately Page 4. I assume there's no objection to that rearrangement of the file.

Mr. Banks: No.

The Court: If there's nothing further, then, at this time we'll stand in recess.

Mr. Welch, on your certificate of service, I assume you'll have something in the file that you've complied.

Why don't you simply recite, "without prejudice to your position on appeal," if you decide to appeal? And then that will further support you.

I, RONALD F. HUBBARD, official reporter in the United States District Court for the District of Utah, do hereby certify the foregoing transcript to be true and correct.

Dated this ..... day of March, 1962, at Salt Lake City, Utah.

/s/ RONALD F. HUBBARD

LYLE L. JONES
Antitrust Division
Department of Justice
Room 969 Flood Bldg.
870 Market Street
San Francisco 2, California
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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Civil Action No. C-30-61

UNITED STATES OF AMERICA, *Plaintiff*,

v.

UTAH PHARMACEUTICAL ASSOCIATION, *Defendant*.

Trial Stipulations

I

THE FOLLOWING STATEMENTS ARE ADMITTED BY BOTH PLAINTIFF AND DEFENDANT TO BE TRUE

1. The defendant is a corporation organized and doing business under the laws of the State of Utah. Its office is located in Salt Lake City.

2. Officers, Members of the Executive Boards, and Directors of U. Ph. A. for the periods indicated are as follows:

1954-1955

Executive Board: Dan W. Manning, President; A. G. Eitner, Immediate Past President; C. L. Prisk, 1st Vice President; C. E. Athas, 2nd Vice President; Wallace P. Johnson, Treasurer; Earle F. Gardemann, Secretary.

Board of Directors: Glenn H. Cooper, Ralph V. Daniels, C. E. Elkington, Kimball Fisher, George P. Polland, Edith C. Hood, and Glade C. Linebaugh.

1955-1956

Executive Board: C. E. Athas, President; C. L. Prisk, Immediate Past President; M. A. Cowley, 1st Vice President; Glenn H. Cooper, 2nd Vice President; Wallace P. Johnson, Treasurer; H. Ward McCarty, Executive Secretary.

Board of Directors: E. C. Elkington, Kimball Fisher, Ralph V. Daniels, Paul M. Haymond, Richard Ensign, Perry B. Thomas, Jack D. Heinz.

1956-1957

Executive Board; M. A. Cowley, President; C. E. Athas, Immediate Past President; Glenn H. Cooper, 1st Vice President; Paul M. Haymond, 2nd Vice President; Jack D. Heinz, Treasurer; H. Ward McCarty, Executive Secretary.

Board of Directors: C. L. Prisk, Ralph V. Daniels, Richard H. Ensign, Perry B. Thomas, Sherman H. Lowe, Merrill Hatch, and Wallace G. Kirkman, Sr.

1957-1958

Executive Board: Glenn H. Cooper, President; M. A. Cowley, Immediate Past President; Paul M. Haymond, 1st Vice President; Jack D. Heinz, 2nd Vice President; Sherman B. Lowe, Treasurer; H. Ward McCarty, Executive Secretary.

Board of Directors: Richard H. Ensign, Perry M. Thomas, Merrill Hatch, Wallace G. Kirkman, Sr., Emory J. Herndon, Joel M. Jolley, Douglas H. Hendricks, and Maron R. Hiatt.

1958-1959

Executive Board: Paul M. Haymond, President; Glenn H. Cooper, Immediate Past President; Jack D. Heinz, 1st Vice President; Emory J. Herndon, 2nd Vice President; Sherman B. Lowe, Treasurer; H. Ward McCarty, Executive Secretary.

Board of Directors: Merrill Hatch, Wallace G. Kirkman, Sr., Joel M. Jolley, Douglas H. Hendricks, Maron R. Hiatt, Ward W. Killpack, Leon M. Watson.

1959-1960

Executive Board: Jack D. Heinz, President; Paul M. Haymond, Immediate Past President; Emory J. Herndon, 1st Vice President; Wallace G. Kirkman, Sr., 2nd Vice President; Sherman B. Lowe, Treasurer; H. Ward McCarty, Executive Secretary.

Board of Directors: Douglas H. Hendricks, Joel M. Jolley, Maron R. Hiatt, Ward W. Killpack, Leon M. Watson, Merrill B. Hatch, C. Albert Olson.

1960-1961

Executive Board: Emory J. Herndon, President; Jack D. Heinz, Immediate Past President; Wallace G. Kirkman, Sr., 1st Vice President; Joel M. Jolley, 2nd Vice President; Albert Olson, Treasurer; H. Ward McCarty, Executive Secretary.

Board of Directors: Paul M. Haymond, Ward W. Killpack, Leon M. Watson, Merrill B. Hatch, Sherman B. Lowe, Maron R. Hiatt, Glenn I. Robertson.

3. Five local pharmaceutical associations in Utah are: Cache Valley Druggists Association, Eastern Utah Pharmaceutical Association, Weber County Pharmaceutical Association, Utah County Pharmaceutical Association, and Southern Utah Pharmaceutica Association.

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4. Most of the drugs which are the subject matter of this case are known as legend drugs. If dispensed in a pharmacy federal law requires such drugs to be dispensed by a registered pharmacist and only upon the prescription of a duly licensed medical practitioner.

5. Over 90 per cent of the prescriptions dispensed by pharmacists in the State of Utah during the period covered by the complaint herein consisted of drugs which were dispensed without additional pharmaceutical manipulation by the pharmacist.

6. During each year covered by the complaint, the dollar value of prescriptions dispensed to consumers in the State of Utah by members of defendant was substantial.

7. Most of the drugs used to fill prescriptions in the State of Utah are manufactured outside of the State of Utah and are shipped from the place of manufacture either to wholesale drug firms located in the State of Utah or directly to pharmacies within the State of Utah.

8. Wholesale drug firms and drug manufacturers sell drugs having a substantial dollar value regularly in the normal course of their business to pharmacies located in the State of Utah.

9. The most common purchases of drugs by pharmacies are in quantities of 25, 50, 100, 500 and 1,000, and are received by the pharmacies in the original packages or containers of the manufacturer.

10. A pharmacist in dispensing a prescription is engaged in the practice of a learned profession.

11. Prescription pricing schedules have been used by many pharmacists in the practice of pharmacy since 1828. There are many prescription pricing schedules available for use and used by pharmacists to price prescriptions throughout the United States.

12. Most schools of pharmacy throughout the United States teach their students how to use a prescription pricing schedule.

13. Exhibit 48 is titled "Utah Pharmaceutical Association Prescription Pricing Schedule prepared by University of Utah College of Pharmacy."

14. Exhibit 49 is titled "Utah Pharmaceutical Association Prescription Pricing Schedule Prepared by the University of Utah College of Pharmacy."

15. Exhibit 51 is titled "Suggested Prescription Pricing Schedule Prepared for Utah Pharmaceutical Association by University of Utah College of Pharmacy."

16. Exhibit 52 is titled "Prescription Pricing Service Prepared for Utah Pharmaceutical Association by University of Utah College of Pharmacy."

17. Dr. Ewart Swinyard was a member of the U.Ph.A. Committee on Rx Pricing, Wages and Hours during the years 1955 through 1959.

18. A pharmacist in dispensing a prescription is required by the laws of the State of Utah to collect a sales tax from a customer when he dispenses a prescription. This sales tax is applied to the total price charged by the pharmacist for the prescription.

19. If a pharmacist used Exhibit 51 as the method of determining the amount to charge a customer for a given prescription, he would follow the following procedure: If the prescription called for 6 capsules, the pharmacist would determine the cost for 100 of the capsules. If the cost, for example, was 70 cents for 100, he would locate 70 cents in the cost column of the schedule and then determine the charge from the column headed "6". In this particular example, the charge would be 75 cents, plus tax.

20. The Utah Pharmaceutical Association set up the following regional meetings:

October 5, Utah County Druggists Association, Parks Cafe at Orem;
October 6, Eastern Utah Druggists Association, Town Cafe at Price;
October 12, Cache Valley Druggists Association, Tropical Cafe at Brigham City;
October 13, Weber County Druggists Association, Mansion House at Ogden;
October 27, Southern Utah Druggists Association, Hotel El Escalante at Cedar City.
(Exhibit 61)

21. As of September 10, 1959, there were 243 licensed pharmacies in Utah. Of these 243, 234 were retail drugstores and 9 were hospital pharmacies. (Exhibit 62, Background material for Budget and Finance Committee).

22. On June 14, 1960, U.Ph.A. proposed a joint meeting of all officers and directors of the Cache Valley Druggists Association, the Weber County Pharmaceutical Association, the Utah County Pharmaceutical Association, the Eastern Utah Pharmaceutical Association, and the Utah Pharmaceutical Association. (Exhibit 63)

23. Exhibit 60 is the Consolidated Membership of U.Ph.A. as of December 1, 1956. (Exhibit 60)

24. Twenty-eight members were appointed to the "Rx Pricing, Wages & Hours Committee" in 1959. Joseph M. Giovacchini was named chairman. (Exhibit 35)

25. The U.Ph.A. in a special bulletin announced a meeting of the Eastern Utah Druggists Association to be held October 6 at the Carbon County Country Club, and invited all store owners, all registered pharmacists, all detail men and all wholesale drug house representatives to attend. (Exhibit 36)

26. The U.Ph.A. announced in a special bulletin a meeting of the Cache Vailey Druggists Association to be held October 12 at the Tropical Cafe, Brigham City. A subject on the agenda was "Use of the Rx Pricing Schedule Wayne Smith." (Exhibit 36)

27. The U.Ph.A. announced in a special bulletin a meeting of the Weber County Druggists Association to be held October 13 at the Mansion House at Ogden. The bulletin stated that there would be a panel discussion "On Use of Pricing Schedule. Kirk P. Nielsen, Moderator. Panel: Dale Bryson, Fred Homer, Tom Purdue." (Exhibit 36)

28. The questionnaires contained in Exhibit 53 were prepared by U.Ph.A. The printing was paid for by the Association. They were mailed in the fall of 1959 to every registered pharmacist registered by the State of Utah during the year 1959. They were mailed by the State Board of Pharmacy at the request of U.Ph.A. The exhibit contains 195 completed questionnaires and each represents a licensed pharmacy in Utah.

29. A tabulation of the answers to question 10 of Exhibit 53 shows that:

(1) 155 pharmacies used the U.Ph.A.-College of Pharmacy Prescription Pricing Schedule.

(2) Of the 155 pharmacies that used the U.Ph.A.-College of Pharmacy Prescription Pricing Schedule, 96 used it all of the time as a matter of store policy and 39 used it 75% of the time.

30. A tabulation of the answers to question 16 of Exhibit 53 shows that 160 were members of U.Ph.A.

31. Under the law of the State of Utah, one desiring to conduct a pharmacy is required to apply to the Department of Business Regulations for a permit. The applicant's pharmacy is licensed as a "Registered Pharmacy." (De-

fendant's Exhibit M) Each year a renewal is required. (Defendant's Exhibit N)

32. A pharmacist desiring to practice his profession in the State of Utah is registered and licensed by the Department of Business Regulation, and is issued a certificate as a "Registered Pharmacist." (Defendant's Exhibit O) Each year a renewal is required. (Defendant's Exhibit P)

33. As of December 31, 1960, there were 610 registered pharmacists who were residing in Utah and were actively practicing their profession in the State of Utah.

34. The defendant, Utah Pharmaceutical Association's Bylaws provide for classes of membership. "Active Members" are the only members who are entitled to vote or to participate in the management of the Association. "Active Members" include registered pharmacists and owners and managers of pharmacies. Both owners and registered pharmacists must be "Active Members" if they belong to the Association. (Defendant's Exhibit A)

35. As of December 31, 1960, of the 610 registered pharmacists who were practicing their profession in Utah, 353 were "Active Members" of the Utah Pharmaceutical Association. There were in addition 14 "Active Members" who were not registered pharmacists. There were 20 "Honorary Members" of the Association who consisted largely of retired pharmacists. Two of these were on December 31, 1960, occasionally practicing their profession.

36. There were approximately 444 non-resident pharmacists on said date who were certified to practice by the Department of Business Regulation, but who were not practicing in the State of Utah.

37. As of December 31, 1960, there were 255 registered pharmacies licensed by the Department of Business Regulations. In addition to pharmacies the Department licensed three dispensaries, three wholesale establishments, and nine hospital pharmacies.

38. On said date, of the 255 registered pharmacies, there were 163 whose owner or manager was a member of the Association. This consisted of 146 registered and non-registered owners, owning 163 pharmacies. In 195 pharmacies either the owner or an employed pharmacist was a member of the Utah Pharmaceutical Association during the 1960 calendar year.

39. That the Bylaws of the Utah Pharmaceutical Association provide that only "Active Members" are eligible to vote or hold office in the Association. (Defendant's Exhibit "A", pages 15 and 16)

40. That "Associate Members," "Honorary Members," and "Student Members" have no voting privileges. (Defendant's Exhibit "A", page 16 and amendment thereto).

41. "Active Members" are generally pharmacists who are registered in Utah and owners and managers employing registered pharmacists. (Defendant's Exhibit "A")

42. That the University of Utah School of Pharmacy prepared and was using a Prescription Pricing Schedule prior to the time Exhibit "48" was developed. (Defendant's Exhibit "D")

43. Plaintiff's Exhibit "52" was sold by the University of Utah College of Pharmacy for $5.00 a set, checks to be made payable to the University of Utah College of Pharmacy. (Defendant's Exhibit "R")

44. That Exhibit "60" is the Consolidated Membership of U.Ph.A. published as of December 1, 1956, and it includes non-resident members and Associate members of the Association.

II

THE TRUTH OF THE STATEMENTS CONTAINED IN THE FOLLOWING STIPULATIONS PROPOSED BY PLAINTIFF IS DENIED BY DEFENDANT.

1. The agenda of the first Board of Directors' meeting held at the Association's office on July 22, 1958, included (1) decision as to place and approximate dates for the four regional pharmacy meetings, and (2) decision on establishing local druggists associations (counterpart of the Cache Valley Druggists Association) in various parts of the State for the purpose of local cooperation. (Exhibit 86, U.Ph.A. Bulletin News, July 1958, p. 19)

2. The Prescription Pricing Committee met on July 22, 1958 at the U.Ph.A. office. (Exhibit 89, U.Ph.A. Bulletin News, September 1958, p. 12)

III

THE TRUTH OF THE STATEMENTS CONTAINED IN THE FOLLOWING STIPULATIONS PROPOSED BY DEFENDANT IS DENIED BY PLAINTIFF.

1. That in 1954 the Department of Business Regulation, State of Utah, licensed 519 resident pharmacists of whom about 30.8% were members of the Utah Pharmaceutical Association. (Defendant's Exhibit "Q")

2. That in 1955 the Department of Business Regulation, State of Utah, licensed 542 resident pharmacists of whom about 30% were members of the Utah Pharmaceutical Association. (Defendant's Exhibit "Q")

3. That in 1956 the Department of Business Regulation, State of Utah, licensed 566 resident pharmacists of whom about 40% were members of the Utah Pharmaceutical Association. (Defendant's Exhibit "Q")

4. That in 1957 the Department of Business Regulation, State of Utah, licensed 583 resident pharmacists of whom about 37% were members of the Utah Pharmaceutical Association. (Defendant's Exhibit "Q")

5. That in 1958 the Department of Business Regulation, State of Utah, licensed 600 resident pharmacists of whom about 50.8% were members of the Utah Pharmaceutical Association. (Defendant's Exhibit "Q")

6. That in 1959 the Department of Business Regulation, State of Utah, licensed 610 resident pharmacists of whom about 60.6% were members of the Utah Pharmaceutical Association. (Defendant's Exhibit "Q")

7. That in 1960 the Department of Business Regulation, State of Utah, licensed 637 resident pharmacists of whom about 56% were members of the Utah Pharmaceutical Association. (Defendant's Exhibit "Q")

8. That the conclusions reached following the survey made under the direction of Dr. Ewart Swinyard, of the University School of Pharmacy (Plaintiff's Exhibit 11, U.Ph.A. Bulletin News, July 1956, page 8) did not take into consideration the increase in the wholesale cost of drugs used in dispensing prescriptions.

9. If a survey were to be made of the charges to patients for the 25 most commonly prescribed drugs in Utah, the results would show a lack of uniformity in the charges made for the prescriptions as dispensed by the pharmacist members of the Utah Pharmaceutical Association.

IV

THE CONTENTS OF THE FOLLOWING QUOTATIONS AND STATEMENTS TAKEN FROM ARTICLES APPEARING IN ISSUES OF THE U.PH.A. BULLETIN NEWS OR FROM DOCUMENTS OBTAINED FROM THE FILES OF DEFENDANT ARE STIPULATED TO BE TRUE AND ACCURATE.

1. Defendant mailed a copy of Exhibit 48 to all drug-stores in the State of Utah in August 1955. (Exhibit 8, U.Ph.A. Bulletin News, September 1955, p. 10)

2. An article appearing in the U.Ph.A. Bulletin News for December 1955, page 4, is titled "UTAH PHARMACEUTICAL ASS'N. PRESCRIPTION PRICING SCHEDULE." and reads in part as follows:

> Last month, just as we were mailing the November issue of The Bulletin, the University of Utah College of Pharmacy provided us with enough copies of the new U.Ph.A. Prescription Pricing Schedule to enable us to leaf in one copy for every one of the 253 drug stores of the State.

(Exhibit 9, U.Ph.A. Bulletin News, December 1955, p. 4)

3. The February 1956 issue of the U.Ph.A. Bulletin News, page 2, announced that a subject on the program of the annual convention would be "Prescription Pricing and the Prescription Dispensary." (Exhibit 10, U.Ph.A. Bulletin News, February 1956, p. 2)

4. The Board of Directors of defendant, at a meeting held June 5, 1956, divided the State of Utah into four regions. Emory Herndon was designated executive chairman of Region 1. Douglas Thornton was designated executive chairman of Region 2. Al Veltri was designated executive chairman of Region 3. Merrill Hatch was designated as executive chairman of Region 4. Regional meetings were set as follows: Region 1 at Ogden, January 14

to 21; Region 2 at Salt Lake City, March 11 to 18; Region 3 at Provo, September 17 to 24; and Region 4 at Richfield, November 12 to 19. (Exhibit 12, U.Ph.A. Bulletin News, June 1956, p. 2)

5. An article appeared in the U.Ph.A. Bulletin News for July 1956, at page 5, reportedly written by M. A. Cowley, president of U.Ph.A. The article stated that the first two executive board meetings held July 3, were workshops for perfecting plans to carry out the "platforms of projects submitted at the May convention." Project I is described as follows: "PROPER PRICING STRUCTURE. Bill Dunn of Murray City Pharmacy was assigned chairman of this activity and directed to select his committee and begin an exhaustive survey. (At the board meeting of July 3, Dunn was transferred from the chairmanship of this committee to the chairmanship of Region 2, Salt Lake City. Jack D. Heinz was assigned chairmanship of Project I.)" (Exhibit 13, U.Ph.A. Bulletin News, July 1956, p. 5)

6. The agenda for the Region 3 meeting to be held September 24, 1956 at the Club Radar in Provo included the following subject: "Prescription Pricing Formulas. A discussion of Current Systems; Victor H. Duke and Dr. Ewart A. Swinyard." (Exhibit 14, U.Ph.A. Bulletin News, September 1956, p. 10)

7. The Region 3 meeting held in Provo at the Club Radar on September 24, 1956 was attended by M. A. Cowley, president of U.Ph.A., Al Veltri, executive chairman of Region 3, Dr. Ewart Swinyard, Emory Herndon and Dean Hiner. (Exhibit 15, U.Ph.A. Bulletin News, October 1956, p. 3)

8. The November 1956 issue of the U.Ph.A. Bulletin News, at page 12, announced the Region 4 meeting to be held in Richfield on November 12, and that a subject on the agenda would be "Discussion and Demonstration of Swinyard's Rx Pricing Schedule and Formula—Dr. Ewart A. Swinyard." (Exhibit 16)

9. An article appearing in U.Ph.A. Bulletin News, January 1957, page 4, is titled "COLLEGE OF PHARMACY - U.Ph.A. PRESCRIPTION PRICING FORMULA." (Exhibit 17-b)

10. Exhibit 49 was distributed with the December issue of the U.Ph.A. Bulletin News. (Exhibit 17-b; U.Ph.A. Bulletin News, January 1957, p. 4)

11. An article in the January 1957 issue of the U.Ph.A. Bulletin News at page 4, refers to the "Revised and enlarged Utah Pharmaceutical Association Prescription Pricing Schedule." (Exhibit 17)

12. Victor H. Duke and Ewart A. Swinyard, in an article appearing in the January 1957 U.Ph.A. Bulletin News, page 6, stated:

> In the final analysis, the success or failure of any schedule is dependent upon two important factors. First, every pharmacist must have confidence that his neighbor, or competing pharmacist, will price prescriptions in keeping with good business practices and in a manner which will reflect the high standards of the profession. Second, no one person or group of persons can outline a method by which another, possibly in a different situation, can meet his costs of doing business. Therefore, a prescription pricing schedule should be used only as a basis for standardizing prescription prices rather than fixing them.

(Exhibit 17-b)

13. The time table of program events for the annual convention to be held in May 1957 as set forth in the U.Ph.A. Bulletin News for May 1957, at page 13, lists the following event to take place at 9:02 A.M. on Tuesday, May 21: "A detailed discussion and report on prescription prices in Utah pharmacies. Dr. Ewart A. Swinyard, University of Utah, member of the U.Ph.A. Committee on Rx Pricing,

Wages and Hours." (Exhibit 19, U.Ph.A. Bulletin News, May 1957, p. 13)

14. Dr. Ewart Swinyard was chairman of U.Ph.A.'s Committee on Prescription Pricing as of December 1957.

15. Dr. Swinyard wrote the letter dated November 26, 1957, published on page 19, U.Ph.A. Bulletin News for December 1957. The letter reads:

> Enclosed is a summary of our recent survey concerning the use and opinion of the Utah Pharmaceutical Association Prescription Pricing Schedule. In view of the results obtained, we are not going to revise the schedule at present. Perhaps these figures would be of interest to readers of the U.Ph.A. Bulletin News.

(Exhibit 22, U.Ph.A. Bulletin News, December 1957, p. 19)

16. The College of Pharmacy, under the direction of Dr. Swinyard, conducted a survey in the fall of 1957. Questionnaires were submitted to 325 drugstores. One hundred four drugstores responded. The questionnaires returned by the 104 drugstores showed that 90 stores employed the U.Ph.A. Prescription Pricing Schedule, or 86.6% of responding drugstores. Eighty-two responding stores were of the opinion that the existing U.Ph.A. schedule was about right; 15 thought the schedule was too low, and 7 thought the schedule was too high. (Exhibit 22, U.Ph.A. Bulletin News, December 1957, p. 19)

17. Jack D. Heinz, 2nd Vice President of U.Ph.A., was chairman of the U.Ph.A. standing committee on "Prescription Pricing, Wages and Hours," (Exhibit 21, U.Ph.A. Bulletin News, July 1957, p. 1)

18. Exhibit 48, which was first published in May 1955, was revised a year later. (Exhibit 23, U.Ph.A. Bulletin News, January 1958, p. 8)

19. The Utah County Pharmaceutical Association was formed April 15, 1959, in Provo, Utah. Those present at

the organization meeting included Paul M. Haymond, President of U.Ph.A., Emory J. Herndon, 2nd Vice President, and Ward McCarty, Executive Secretary. (Exhibit 26, U.Ph.A. Bulletin News, May 1959, pp. 2 and 3)

20. One of the "successes" of Paul Haymond, President of U.Ph.A., and his "team of Officers and Directors was the revision of U.Ph.A. Rx Pricing Schedule, and tremendously increased popularity of its use." (Exhibit 27, U.Ph.A. Bulletin News, June 1959, p. 33)

21. The U.Ph.A. encouraged the formation of four regional pharmaceutical associations. (Exhibit 28, U.Ph.A. Bulletin News, August 1959, p. 8)

22. The Eastern Utah Pharmaceutical Association was organized February 22, 1959, at the Carbon County Country Club in Price. (Exhibit 28, U.Ph.A. Bulletin News, August 1959, p. 8)

23. The first officers of the Eastern Utah Pharmaceutical Association were Rex Hansen, President; Jack Kelly, Vice President; and Albert S. Veltri, Secretary-Treasurer. (Exhibit 28, U.Ph.A. Bulletin News, August 1959, p. 8)

24. As of May 1955, 48% of all licensed drugstores in the State of Utah were members in good standing in U.Ph.A. (Exhibit 64, U.Ph.A. Bulletin News, May 1955, p. 12)

25. The caption of a photo of Dr. Ewart Swinyard and President C. L. Frisk is titled: "Can prescription pricing be stabilized?" (Exhibit 65, U.Ph.A. Bulletin News, June 1955, p. 8)

26. Regional meetings were instructed to cover the topics of "Store Modernization, Rx Pricing, Legislation and Public Relations, Local Regional Problems, Suggestions to incorporate in State Convention." (Exhibit 69, U.Ph.A. Bulletin News, June 1956, p. 1)

27. The Committee on Wages, Hours and Fees as of September 1956 had the following members: Jack D. Heinz,

Executive Board Coordinator; Victor H. Duke, Chairman; Dr. Ewart A. Swinyard; Warren Cluff; Joel Jolly; Robert Erickson; Leonard Day. (Exhibit 71, U.Ph.A. Bulletin News, September 1956, p. 14)

28. As of July 1959 U.Ph.A. had a standing committee, "Rx Pricing, Wages and Hours." (Exhibit 55, U.Ph.A. Bulletin News, July 1959, p. 9)

29. Paul G. Pugh of the 20th East Rexall Drug in Salt Lake City, wrote the Association in July 1959 asking for a copy of the "new U.Ph.A. Rx Pricing Chart." (Exhibit 55, U.Ph.A. Bulletin News, July 1959, p. 14)

30. In July 1959 Pete's Drugs of Ogden requested U.Ph.A. to send "a copy of the Utah Pharmaceutical Association Pricing Chart." (Exhibit 55, U.Ph.A. Bulletin News, July 1959, p. 14)

31. The regional groups were urged to speedily set up an organization which would include a Prescription Pricing, Wages and Hours Committee. (Exhibit 81, U.Ph.A. Bulletin News, September 1957, p. 8)

32. Merrill Hatch, a member of the Board of Directors of U.Ph.A. and sponsor of Region 4, appointed a "Regional Prescription Pricing, Wages and Hours, Seminar and Refresher Committee." (Exhibit 82, U.Ph.A. Bulletin News, October 1957, p. 20)

33. President Haymond named the following members to the Prescription Pricing, Wages and Hours Committee to serve for 1958-1959: Jack D. Heinz, Chairman; Dr. Ewart A. Swinyard; E. Mulloy Prince; Howard J. Keetar; Paul S. Julian; Warren Tonks; Jerrold Warner; and Clyde E. Lambert. (Exhibit 87, U.Ph.A. Bulletin News, August 1958, p. 2)

34. As of December 31, 1958, of the 589 practicing Utah pharmacists 316 were active members of U.Ph.A. and represented 238 of the State's retail pharmacies. (Exhibit 91, U.Ph.A. Bulletin News, January 1959, p. 3)

35. The following appeared on page 12 of the U.Ph.A. Bulletin News, January 1959:

> And here is a very startling and significant fact: The pharmacies that are paying the better salaries . . . invariably without exception . . . are the pharmacies that are religiously using (they make it absolutely mandatory) some standard Prescription Pricing Schedule be it the Geiger Counter, Briggs Voight, People, Pacific Drug Review, San Gabriel, American College of Pharmacy, Hedgepeth, Joe Shine, N.A.R.D., or (the best of all, for Utah) the U.Ph.A. - College of Pharmacy Suggested Rx Pricing Formula.

(Exhibit 91, U.Ph.A. Bulletin News, January 1959, p. 12)

36. Jack D. Heinz, President of U.Ph.A., sent out notices of appointment to members of the Rx Pricing, Wages and Hours Committee, a standing committee of U.Ph.A., in June 1959. (Exhibit 95, U.Ph.A. Bulletin News, July 1959, p. 9)

37. U.Ph.A. set up the following regional meetings to be held during the month of October 1959:

> October 5—Utah County Druggists Association at Parks Cafe in Orem
>
> October 6—Eastern Utah Druggists Association at Town Cafe, Price
>
> October 12—Cache Valley Druggists Association at Tropical Cafe, Brigham City
>
> October 13—Weber County Druggists Association at the Mansion House in Ogden

(Exhibit 96, U.Ph.A. Bulletin News, September 1959, p. 18)

38. Albert S. Veltri, Secretary of the Eastern Utah Pharmaceutical Association, thanked Ward McCarty, the U.Ph.A. and the State Board of Pharmacy members for

attending their regional meeting held at Price. (Exhibit 97, U.Ph.A. Bulletin News, December 1959, p. 6)

39. On March 10, 1960 there was a combined meeting of the Board of Directors of U.Ph.A. and the Utah County Pharmaceutical Association in Spanish Fork. (Exhibit 99, U.Ph.A. Bulletin News, July 1960, p. 12)

40. The officers and directors of all local pharmaceutical associations were scheduled to meet with the Board of Directors of U.Ph.A. on July 18, 1960. (Exhibit 99, U.Ph.A. Bulletin News, July 1960, p. 12)

41. Exhibit 48 was distributed free by the defendant to any person asking for it. (Exhibits 5, 6 and 7, U.Ph.A. Bulletin News for June, July and August 1955 at pp. 2, 5 and 6, respectively.)

42. The following appeared in the U.Ph.A. Bulletin News, June 1955, at page 5:

> . . . . the druggist not using some generally accepted and approved prescription pricing schedule is antiquated, out-dated, and actually doing business in a horse-and-buggy fashion.
>
> Doctors recognize the necessity of establishing uniform fees for home and office calls, surgical procedures, etc. Dentists recognize the ethics and responsibility which demand uniform dental fees. Architects and Professional Engineers have long had uniform fee schedules. Even the barber quickly sees the desirability of uniformity.
>
> But druggists are different. ("No one is going to influence me to use those silly complicated charts. And besides, why should I be damfoolenough to use a schedule when they can get Rx's cheaper anyway at Pay-Central Drugs!"). . .

(Exhibit 5, U.Ph.A. Bulletin News, June 1955, p. 5)

43. A proposed subject of the annual convention to be held at Vernal, Utah in May 1955, was "Rx Prices. Let's air the subject." (Exhibit 3, U.Ph.A. Bulletin News, April 1955, p. 1)

44. The published agenda for the annual convention of the Association held on Monday, May 16, 1955, included the following item:

> . . . 1:45 P.M.—"Rx pricing in Utah and the presentation of a U.Ph.A. Rx Pricing Schedule," Dr. Ewart Swinyard, College of Pharmacy, University of Utah. Question period. . . .

(Exhibit 4, U.Ph.A. Bulletin News, May 1955, p. 2)

45. The following appeared on page 5 of the U.Ph.A. Bulletin News, June 1955:

> Copies of the special Prescription Pricing Chart prepared by the University of Utah College of Pharmacy and presented at the U.Ph.A. Convention in Vernal, can be had without charge, simply by requesting your executive secretary to mail it to you. Free.

(Exhibit 5, U.Ph.A. Bulletin News, June 1955, p. 5)

46. President Cowley at a meeting of the Board of Directors of U.Ph.A. held July 3, 1956, stated that he wanted the concept of a suggested formula as an aid in the professional pricing of prescriptions emphasized at the fall regional meetings. (Exhibit 39, Minutes of Meeting)

47. The Board of Directors of U.Ph.A. at a meeting held October 9, 1956, agreed on the agenda of the regional meeting to be held at Richfield on November 12. The agenda includes: "Swinyard Rx Formula" and "College of Pharmacy Suggested Rx Pricing Formula." (Exhibit 41, Minutes of Meeting)

48. Jack Heinz, at a meeting of the Board of Directors of U.Ph.A. held October 31, 1957, discussed a recent spot survey made by the U. of U. College of Pharmacy on the use of Rx pricing formula in Utah pharmacies. (Exhibit 42, Minutes of Meeting)

49. The Board of Directors of U.Ph.A. at a meeting held June 14, 1958 discussed formulas for Rx pricing. (Exhibit 43, Minutes of Meeting)

50. Jack Heinz, President of U.Ph.A. at a meeting of the Board of Directors on March 3, 1960, stated that one of the problems of the profession of pharmacy in Utah, as emphasized in Utah County, was "unethical price cutting." (Exhibit 47, Minutes of Meeting)

V

THE TRUTH OF THE CONTENTS OF THE FOLLOWING QUOTATIONS AND STATEMENTS TAKEN FROM ARTICLES APPEARING IN ISSUES OF THE U.PH.A. BULLETIN NEWS OR FROM DOCUMENTS OBTAINED FROM THE FILES OF DEFENDANT IS DENIED BY DEFENDANT.

1. At the Region 3 meeting held in Provo on September 24, 1956 Dr. Swinyard discussed prescription pricing. (Exhibit 15, U.Ph.A. Bulletin News, October 1956, p. 3)

2. Exhibit 49 represented the combined efforts of the U.Ph.A. Committee on Prices, Wages and Hours, the University of Utah College of Pharmacy, and many pharmacists and druggists throughout the State. (Exhibit 17-b, U.Ph.A. Bulletin News, January 1957, p. 4)

3. In preparing Exhibit 49, the U.Ph.A. Committee on Prices, Wages and Hours concluded that increased costs of operations required an increase in prescription prices. (Exhibit 17-b, U.Ph.A. Bulletin News, January 1957, p. 4)

4. In preparing Exhibit 49, the U.Ph.A. Committee on Prices, Wages and Hours took into consideration the aver-

age monthly salary of a Utah pharmacist. (Exhibit 17-b, U.Ph.A. Bulletin News, January 1957, p. 4)

5. The following appeared in the U.Ph.A. Bulletin News, January 1958, at page 8, in an article titled "Short History of Cache Valley Druggists Assn.":

> About that time, U.Ph.A. announced the first state pricing schedule for prescriptions.
>
> All members of the Cache Valley Druggists Association saw the schedule was good and followed it to a man. This decision . . . to accept the Rx pricing schedule . . . is perhaps the most far-reaching decision the group has made. All pharmacists in the Valley found themselves pricing manifestly below the schedule. Adopting it really paid off. It has helped Cache Valley Pharmacies more than any other single decision. Furthermore, after the boys began use of the Rx pricing schedule, they found to their surprise, they had far less complaints from customers, and doctors were evidencing more confidence in the pharmacist simply because doctors had found that no matter where they referred their prescriptions, the price for compounding was invariably the same.

(Exhibit 23, U.Ph.A. Bulletin News, January 1958, p. 8)

6. Members of the Cache Valley Druggists Association accepted Exhibit 49 and used it faithfully from the date of its publication to January 1958. (Exhibit 23, U.Ph.A. Bulletin News, January 1958, p. 8)

7. A member of the Cache Valley Druggists Association told H. Ward McCarty, Executive Secretary of U.Ph.A., that he bought a new Pontiac and that the purchase was made possible only by his use of the U.Ph.A. Prescription Pricing Schedule. (Exhibit 23, U.Ph.A. Bulletin News, January 1958, p. 8)

8. A long range plan of U.Ph.A. was "Stabilization of professional Rx fees." (Exhibit 27, U.Ph.A. Bulletin News, June 1959, p. 33)

9. "The U.Ph.A. Committee on Rx Pricing, Wages & Hours has been working for the past twelve months on revising our Prescription Pricing Schedule. The work is now complete. The new schedule will be released at the big, 67th Annual Convention, June 7, 8, 9 at Hotel Utah. Be sure you attend and be sure you are one of the first to get the new schedule. And . . . of course . . . be sure to use it. Refer to it much oftener than you do the Good Book. Have as much faith in it too." (Exhibit 27, U.Ph.A. Bulletin News, June 1959, p. 36)

10. The Committee on Wages, Hours and Fees was "doing a very commendable job in surveying conditions throughout the state" as of September 1956. (Exhibit 71, U.Ph.A. Bulletin, September 1956, p. 14)

11. U.Ph.A.'s Committee on Wages, Hours and Professional Fees "met often, worked hard, and accomplished much." (Exhibit 72, U.Ph.A. Bulletin News, December 1956, p. 2)

12. At the regional meeting held at Richfield on November 12, Dr. Swinyard covered the subject of professional fees. (Exhibit 73, U.Ph.A. Bulletin News, December 1956, p. 2)

13. One of the duties of the Executive Secretary, U.Ph.A. was to serve ex-officio as secretary of each standing committee and prepare minutes. (Exhibit 87, U.Ph.A. Bulletin News, August 1958, p. 2)

14. A requirement of membership in the local associations was membership in the Utah Pharmaceutical Association. The local associations were to be fostered in every practical way by the State Association. (Exhibit 90, U.Ph.A. Bulletin News, October 1958, p. 8)

15. Pharmacists in Ogden organized the Weber County Druggists Association on September 16, 1958. The organizing committee included Vince Tassone, Herb Stewart, Dick Ensign, Harold Dirber and Emory Herndon. The association was organized under the sponsorship of U.Ph.A. (Exhibit 90, U.Ph.A. Bulletin News, October 1958, p. 8)

16. Ward McCarty referred to the U.Ph.A. prescription pricing schedule as the "Golden key that will determine just how well several Utah pharmacies will survive over the next five years." He further predicted that it would be the unusual drugstore to still be in operation in 1964 if it did not use some "approved schedule." (Exhibit 94, U.Ph.A. Bulletin News, April 1959, p. 1)

17. As of December 31, 1959, 86% of the pharmacists and owners of pharmacies living in the State of Utah were active members of U.Ph.A., according to Jack D. Heinz, President, U.Ph.A. (Exhibit 98, U.Ph.A. Bulletin News, January 1960, p. 5)

18. A prescription survey of 16,083 prescriptions made in the State of Utah for the period January to December 1955 under the auspices of the University of Utah College of Pharmacy, showed that 15,433 or 96% were dispensed as manufactured; only 650, or 4%, required compounding. (Exhibit 11, U.Ph.A. Bulletin News, July 1956, p. 8)

19. Exhibit 48 (Utah Pharmaceutical Association Prescription Pricing Schedule) was discussed at a meeting of the Board of Directors of U.Ph.A. held December 10, 1955, and one of the officers or directors pointed out that the schedule was at least 10% too low on mark-up across the board. (Exhibit 38, Minutes of Meeting)

VI

DOCUMENTS WHICH DEFENDANT ADMITS WERE PUBLISHED IN THE BULLETIN NEWS OR OTHERWISE AND DISTRIBUTED TO THE MEMBERS BY THE ASSOCIATION BUT CAN NEITHER AFFIRM NOR DENY THE TRUTH OF THE STATEMENTS CONTAINED THEREIN BUT FEELS THAT THE DOCUMENTS SHOULD SPEAK FOR THEMSELVES.

1. The job of the "Committee on Prescription Pricing, Wages & Hours" as described in a document obtained from the files of the U.Ph.A. was:

"1. Raising the average price of prescriptions in Utah to the level where they will carry their full share of the operating costs of the pharmacy and yield a satisfactory profit *as a professional service* AND NOT AS A RETAIL MERCHANDISE TRANSACTION.

"2. Raising the salary rate of registered pharmacists up to at least that of meat-cutters, plumbers, masons, cat-skinners, and cargo truck drivers.

"3. Bringing uniformity of hours and a shorter work-week for registered pharmacists . . ." (Exhibit 34)

2. One of the jobs of the Committee on Prescription Pricing, Wages & Hours was "to get Every Pharmacy and Every Pharmacist in Utah Converted To The 100% Use Of An Rx PRICING SCHEDULE . . ." (Exhibit 34, "What is the job of the Committee on Prescription Pricing, Wages & Hours")

3. Two of the traits necessary for a man to be on the Committee on Prescription Pricing, Wages & Hours, according to Exhibit 34, were: "Had been 'In on RX Pricing Schedule Programs' from the beginning. Had a natural interest in upgrading profits in the profession and in upgrading the remuneration of pharmacists as professional men." (Exhibit 34, "What is the Job of the Committee on Prescription Pricing, Wages & Hours")

4. The secretary of U.Ph.A. in a special bulletin addressed to pharmacy owner-managers took the position that a prescription pricing schedule must be used all of the time if one intended to run a profitable and ethical retail pharmacy, and suggested that the U.Ph.A. Schedule which was enclosed with the bulletin be used "today . . . all this week . . . all month . . . all year. For keeps and for profit. For ethics and for good business practice." (Exhibit 37)

5. The secretary of U.Ph.A. in a special bulletin addressed to pharmacy owner-managers took the position that pharmacy owners rob themselves of take-home pay every time they fill a prescription without using an accepted "prescription pricing schedule." (Exhibit 37)

6. The secretary of U.Ph.A. in a special bulletin addressed to pharmacy owner-managers suggested that they use the U.Ph.A. Schedule and that it "be used in *your* operation 100%." (Exhibit 37)

7. A tabulation of the answers to question 17 of Exhibit 53 shows that 164 regularly read the U.Ph.A. Bulletin News.

8. The questionnaire contained in Exhibit 53 returned by John B. Heinz, Heinz Apothecaries, shows that the pharmacy used a prescription schedule all of the time and the schedules used were the U.Ph.A. - College of Pharmacy and "Other."

9. An article appeared in the U.Ph.A. Bulletin News for August 1955, page 6, entitled "U.Ph.A. RX PRICING SCHEDULE," and reads in part as follows:

> Every week brings new requests for the popular, simple and effective Rx pricing schedule created for U.Ph.A. by Dr. Ewart Swinyard and his staff, at the College of Pharmacy, University of Utah.

(Exhibit 7, U.Ph.A. Bulletin News, August 1955; p. 6)

10. An article appearing in the September 1955 issue of the U.Ph.A. Bulletin News, page 10, referred to Exhibit 48 as "The U.Ph.A. Rx Pricing Schedule." (Exhibit 8)

11. "We hope with all our hearts that there will be no drugstores in the State, either large or small, that lack the wisdom and foresight to put this schedule [Exhibit 48] into honest and intelligent use." (Exhibit 8, U.Ph.A. Bulletin News, September 1955, p. 10)

12. "You have the schedule, now you must develop confidence in your calling. Do not permit yourself to be tossed hither and yon by every nasty little rumor that 'The store across the street only charged - - - -.' Remember that the store across the street is hearing the same silly details about you." (Exhibit 8, U.Ph.A. Bulletin News, September 1955, p. 10)

13. A survey made under the direction of Ewart A. Swinyard during 1956 showed that the overall average price per prescription increased 11.4% in 1955 over the overall average price per prescription in 1954. (Exhibit 11, U.Ph.A. Bulletin News, July 1956, p. 8)

14. "Since this increase [11.4% from 1954 to 1955 in the overall average price per prescription] occurred during the period the University of Utah Prescription Pricing Schedule was originated and promoted, it is tempting to conclude that this price increase reflects the general use of this schedule." (Exhibit 11, U.Ph.A. Bulletin News, July 1956, p. 8)

15. The U.Ph.A. Bulletin News for January 1957 announced the Metropolitan Salt Lake Regional Meeting to be held on January 30, and that a subject on the agenda was "College of Pharmacy Reports on Rx Pricing Schedule—Victor H. Duke and Jack D. Heinz." (Exhibit 17)

16. Victor H. Duke and Ewart A. Swinyard, in an article appearing in the U.Ph.A. Bulletin News, January 1957, at page 6, stated:

> It is urged that Utah pharmacists use this schedule as a basis for consistent and fair pricing throughout the state. It is felt that the use of the U.Ph.A. Prescription Pricing Schedule will not only enable pharmacies to meet increased costs of doing business but also will help to improve the standard of professional service now available.

(Exhibit 17-b)

17. An article appearing in the May 1957 U.Ph.A. Bulletin News, at page 2, is titled "Dr. Swinyard to Analyze Prescription Prices - Promises no Punches Pulled." (Exhibit 18)

18. The following article appeared in the May 1957 U.Ph.A. Bulletin News, at page 2:

> If you are a pharmacy owner-operator of "the old school" in which you have felt there was no particular need for a "prescription pricing schedule" . . . or if you have not trusted your pharmacy colleagues in neighboring pharmacies, feeling that they were shysters and price-cutters, and if you use the "prescription pricing schedule" your colleagues would surely undersell you . . . We say, if you are one of these . . . it may be just as well that you miss this discussion. • • •

(Exhibit 18, U.Ph.A. Bulletin News, May 1957, p. 2)

19. The following appeared in the May 1957 U.Ph.A. Bulletin News, at page 2: "You will never know how much profit you have been giving away until you hear Dr. Swinyard's discussion." (Exhibit 18, U.Ph.A. Bulletin News, May 1957, p. 2)

20. Glenn M. Cooper, elected President of U.Ph.A. in May 1957, pledged continuance of the Four Point Platform presented by the previous president, Mel Cowley, at the Ogden convention held in 1956, published in the U.Ph.A. Bulletin News for July 1956, at page 5. (Exhibit 20, U.Ph.A. Bulletin News, June 1957, p. 8)

21. It was the intention of the officers and executive board elected in May 1957, "to continue relentless studies of prescription pricing in Utah; to digest the data and to formulate constructive and realistic pricing formulas that will lift pharmacy in the State of Utah to a more professional level." (Exhibit 20, U.Ph.A. Bulletin News, June 1957, p. 8)

22. President Cooper noted "that the Pricing Schedule [Exhibit 49] as worked out this year has raised the standards of every drugstore in our state and has been an important factor in bringing about better wages for pharmacists." (Exhibit 20, U.Ph.A. Bulletin News, June 1957, p. 8)

23. President Cooper noted that "The Prescription Pricing Committee has done a remarkable job and it is the intention of your new officers and executive board to continue this program without change." (Exhibit 20, U.Ph.A. Bulletin News, June 1957, p. 8)

24. The Eastern Utah Pharmaceutical Association reported to U.Ph.A. that it had "adopted (officially) the U.Ph.A.-College of Pharmacy Rx Pricing Schedule" and that the members were using it. (Exhibit 28, U.Ph.A. Bulletin News, August 1959, p. 8)

25. Members of the Eastern Utah Pharmaceutical Association created a schedule of "special exceptions to the Rx Pricing Schedule" to handle special situations peculiar to the area. (Exhibit 28, U.Ph.A. Bulletin News, August 1959, p. 8)

26. The following letter was published in the September 1959 issue of the U.Ph.A. Bulletin News at page 14: "Sirs: We received your suggested Rx Pricing Schedule and have adopted it for immediate use. • • • Lawrence Hood. Hood Walgreen Drug, Tooele." (Exhibit 30)

27. The following letter was published in the September 1959 issue of the U.Ph.A. Bulletin News at page 14: "Dear Editor: I received the Rx Pricing Schedule and think it is a dandy. • • • L. S. Briggs, The Briggs Pharmacy, American Fork." (Exhibit 30)

28. An article appearing in the December 1959 issue of U.Ph.A. Bulletin News at page 2, is titled: "EASTERN UTAH PHARMACEUTICAL ASSOCIATION ADOPTS UTAH RX SCHEDULE WITH AMENDMENTS." (Exhibit 31)

29. Eastern Utah pharmacists made universal use of the State suggested Rx schedule with certain changes. (Exhibit 31, U.Ph.A. Bulletin News, December 1959, p. 2)

30. The following letter was published in the January 1960 issue of the U.Ph.A. Bulletin News at page 9: "Dear Mac: Thanks for the extra copies of the U.Ph.A. Pricing Schedule. The Eastern Utah Druggists Association is really making use of it. Now I do believe we'll begin to make an equitable profit. Thanks again. Al Veltri, Veltri's Rexall Drug, Helper." (Exhibit 32)

31. C. E. Athas, President of U.Ph.A. for the period June 1955 to May 1956, stated to the membership: "We must have a strong local group in Cache Valley, one in the Ogden-Brigham City area, one in Salt Lake County, one in Utah County, one in the Uintah Basin, one in Price, one in Sanpete and Sevier Counties and one in Cedar City-St. George area. • • • Can you get going by yourselves or will you need help from the board? • • •" (Exhibit 66, U.Ph.A. Bulletin News, June 1955, p. 9)

32. C. E. Athas, President of the U.Ph.A. for the period June 1955 to May 1956 stated to the membership: "Let us

get our houses in order. We can no longer be a house divided. Better take another long, serious look at the poor public relations climate we enjoy simply because we have not had the fortitude as a profession to adopt a uniform prescription pricing schedule." (Exhibit 66, U.Ph.A. Bulletin News, June 1955, p. 9)

33. The Committee on Wages, Hours and Fees was "doing a very commendable job in surveying conditions throughout the state" as of September 1956. (Exhibit 71, U.Ph.A. Bulletin, September 1956, p. 14)

34. Wallace G. Kirkman, Jr., Secretary of the Cache Valley Druggists Association, wrote to U.Ph.A. in July 1959 and stated that there were two stores in CVDA which did not have the new U.Ph.A. pricing schedule and asked that he be sent four new schedules. (Exhibit 55, U.Ph.A. Bulletin News, July 1959, p. 14)

35. An article appearing in the November 1959 issue of the U.Ph.A. Bulletin News at page 3, over the name of Jack D. Heinz, President, stated:

> If every pharmacist who says he is using our new Prescription Pricing Schedule really is, we have made phenominal progress! If we keep plugging the use of the Pricing Schedule, the minority who are not using it will soon recognize its merits and come to their professional and economic senses.
>
> But there is no question that the schedule is still much too low for the present day drug economy. It will soon have to be adjusted and revised, especially in the lower brackets.

(Exhibit 56, U.Ph.A. Bulletin News, November 1959, p. 3)

36. On January 14, 1957, the Cache Valley Druggists Association elected new officers. The group at the meeting considered, among other items, "prescription pricing

schedules." (Exhibit 74, U.Ph.A. Bulletin News, February 1957, p. 11)

37. Emory Herndon, chairman of the Region 1 group, in telling Ward McCarty about the meeting to be held in Ogden on March 18, stated, "Mac, don't forget to point out to everyone that this regional meeting will be different. Note the total absence of our panel of doctors, dentists and pharmacists, the missing Rx pricing schedule discussion, and the missing review of new drugs." (Exhibit 75, U.Ph.A. Bulletin News, March 1957, p. 2)

38. Jack Heinz, as chairman of the committee on Rx Pricing, Wages and Hours, reported "on our Prescription Pricing Schedule" at the annual convention held in May 1957. (Exhibit 77, U.Ph.A. Bulletin News, June 1957, p. 2)

39. An article under the assumed name of "Peeve Milktoast" stated, "* * * For gosh sakes let's get a pricing schedule from U.Ph.A. AND USE IT. IITS THE ONLY FAIR DEAL TO YOU AND YOUR CUSTOMER." (Exhibit 78, U.Ph.A. Bulletin News, July 1957, p. 4)

40. In announcing a regional meeting to be held at Fish Lake on August 26, 1957, the statement was made, "Jack D. Heinz and his committee will report further on the results of the U.Ph.A. prescription pricing formula." (Exhibit 79, U.Ph.A. Bulletin News, August 1957, p. 1)

41. The caption under photo 12 in the U.Ph.A. Bulletin News, September 1957, stated, "Chet Baker and Jerry Warner at Filmore swear by U.Ph.A. Rx Pricing Schedule." (Exhibit 80, U.Ph.A. Bulletin News, September 1957, p. 6)

42. As of January 1958 the following individuals were chairmen of the Regional Rx-Pricing, Wages and Hours Committees: Clifford Stauffer, Region 1 (Northern Utah, Kaysville inclusive north); Douglas Beckstead, Region 2 (Metropolitan Salt Lake Valley); Alan Creer, Region 3

(Central and Eastern Utah); Dale Briggs, Region 4 (Southern Utah). (Exhibit 83, U.Ph.A. Bulletin News, January 1958, pp. 16 & 17)

43. U.Ph.A. Committees were active during the period May 1957 to June 1958. The Rx-Pricing Committee consisted of Dr. Ewart Swinyard, Chairman, Douglas Beckstead, Robert E. Erickson, Leonard Day, Karl G. Lowe and Warren Cluff. (Exhibit 84, U.Ph.A. Bulletin News, June 1958, pp. 4 & 8)

44. Each of the State's four regions set up local committees to correspond with U.Ph.A.'s standing committees. They included an RX-Pricing, Wages and Hours Committee. (Exhibit 85, U.Ph.A. Bulletin News, June 1958, pp. 12 & 16)

45. The following appears on page 1 of the U.Ph.A. Bulletin News, September 1958:

> U.Ph.A. Committee on Prescription Pricing has been authorized by the Board of Directors to: Revise the present Rx Pricing Schedule; have 500 copies printed; plasticize 100 copies which the U.Ph.A. secretary will send to pharmacies for a $2 bill. You may expect the beauties in late December.

(Exhibit 88, U.Ph.A. Bulletin News, September 1958, p. 1)

46. Local associations "now in the process of being organized under the sponsorship of U.Ph.A. include: Box Elder County Association; Davis County Association; Tooele and Salt Lake Counties Association; Metropolitan Salt Lake City Association; Utah County Association; Eastern Utah Association; Sanpete and Sevier Counties Association, and Southwestern Utah Association." (Exhibit 90, U.Ph.A. Bulletin News, October 1958, p. 8)

47. Dr. Ewart Swinyard at the Region 2 (Metropolitan-Salt Lake Valley) meeting held January 23, 1959, discussed the final revision of the U.Ph.A.-College of Pharmacy Rx

Pricing Schedule which was to be made available in March 1959. (Exhibit 25, U.Ph.A. Bulletin News, February 1959, p. 19)

48. Actions of the Weber County Pharmaceutical Association was considered proof of what could be done on the local level by getting together under the over-all concept of action within the U.Ph.A. Other Utah geographical units were encouraged to organize in a like manner. (Exhibit 25, U.Ph.A. Bulletin News, February 1959, p. 19)

49. Officers of the Cache Valley Druggists Association for 1959 were: Clifford Stauffer, Hyrum Drug, President; Grant Ballam, New Budge Pharmacy, Vice President; and Wallace G. Kirkman, Jr., Better Service Pharmacy, Secretary. (Exhibit 25, U.Ph.A. Bulletin News, February 1959, p. 19)

50. Doug Hendricks of Hendricks Prescription Center at Provo admitted to Ward McCarty, Executive Secretary of U.Ph.A. that "a 14 hour shift in a one-man store is no problem at all compared to getting the local boys to agree on an ethical Rx pricing schedule." (Exhibit 92, U.Ph.A. Bulletin News, March 1959, p. 8)

51. Grant L. Ballam, owner-manager of Grant's New Budge Clinic Pharmacy in Logan and Vice President of the Cache Valley Druggists Association, wrote U.Ph.A. requesting a copy of the U.Ph.A.-College of Pharmacy Rx Pricing Schedule. In the letter he expressed the opinion that the most professional thing a pharmacist can do for his community is to make a profit so that he can remain in business to serve the public. (Exhibits 25 and 93, U.Ph.A. Bulletin News for February 1959, p. 19 and March 1959, p. 16)

52. Drews Anderson at Moroni thanked Ward McCarty for his visit "on the 9th" and stated, "I'm trying to get on the Rx Pricing Schedule you mentioned." (Exhibit 94, U.Ph.A. Bulletin News, April 1959, p. 1)

53. Robert C. Hansen of Drug Center, Inc., Cedar City, acknowledged a special delivery letter from Ward McCarty, Executive Secretary, and informed him of a meeting of the Southern Utah Druggists Association to be held October 27 at the Hotel El Escalante, Cedar City. The business session was to be handled by Merrill B. Hatch (a director of U.Ph.A) and one of the problems to be discussed was "Exceptions to the U.Ph.A. Rx Pricing Schedule." (Exhibit 96, U.Ph.A. Bulletin News, September 1959, p. 18)

54. An article appearing in the U.Ph.A. Bulletin News for July 1955, at page 2, is titled, "U.Ph.A. Rx Pricing Schedule Popular." (Exhibit 6, U.Ph.A. Bulletin News, July 1955, p. 2)

55. Exhibit 48 is "a copy of the Rx Pricing Schedule worked out by Dr. Ewart Swinyard of the University of Utah College of Pharmacy." (Exhibit 6, U.Ph.A. Bulletin News, July 1955, p. 2)

56. Exhibit 48 was represented "to be the real answer to better prescription pricing in Utah." (Exhibit 6, U.Ph.A. Bulletin News, July 1955, p. 2)

57. Progressive druggists all over the State of Utah were starting to adopt Exhibit 48 in July of 1955. (Exhibit 6, U.Ph.A. Bulletin News, July 1955, p. 2)

58. The Cache Valley Pharmacists District Association was organized on June 16, 1955. The first officers of the association were Wallace Kirkham, President, V. C. Olsen, Vice President, C. J. Stauffer, Secretary-Treasurer. (Exhibit 6, U.Ph.A. Bulletin News, July 1955, p. 2)

59. The minutes of the meeting of the Board of Directors of the U.Ph.A. on January 8, 1959, contain the following:

> Dr. Swinyard discussed the College of Pharmacy suggested pricing formula and explained how it was being revised in line with current trends in the many formulas and data from surveys. There seemed a general agreement. (Exhibit 44, Minutes of Meeting).

VII

THE FOLLOWING ARE QUOTATIONS OR STATEMENTS FROM THE U.PH.A. BULLETIN NEWS, MINUTES OF THE BOARD OF DIRECTORS OR OTHER DOCUMENTS WHICH PLAINTIFF STIPULATES ARE ACCURATELY QUOTED. PLAINTIFF CAN NEITHER AFFIRM NOR DENY THE TRUTH OF THE STATEMENTS CONTAINED THEREIN AND FEELS THAT THE DOCUMENTS SHOULD SPEAK FOR THEMSELVES.

1. That in the January 1959 issue of the Bulletin News, page 12, appears the following:

> And here is a very startling and significant fact: The pharmacies that are paying the better salaries. . . . invariably without exception. . . . are the pharmacies that are religously using (they make it absolutely mandatory) some standard Prescription Pricing Schedule, be it the Geiger Counter, Briggs, Voight, Peoples, Pacific Drug Review, San Gabriel, American College of Pharmacy, Hedgepeth, Joe Shine, N. A. R. D., or (the best of all, for Utah) the U.Ph.A. College of Pharmacy Suggested Rx Pricing Formula.
>
> (Defendant's Exhibit "B")

2. That Plaintiff's Exhibit "37" contains the following written by Ward McCarty, Secretary of the Defendant Association.

> It is not so important *Which* Prescription Pricing Schedule you use. (So long as it is not "your own" . . . . one that you have personally devised.) BUT IT IS IMPORTANT that you do use one.

3. That the minutes of the regular Board of Directors' Meeting held July 3, 1956, contains the following:

> It was noted that the secretary had included in the June mailing of the Bulletin, an excellent Rx pricing formula for Opthalmic Solutions in order to get

pharmacists to think about it. The Formula was merely a suggestion-but it emphasized what can be done - - and how important small percentage increments in price can be. The schedule also suggested the use of odd cent pricing. It was agreed that the suggested Opthalmic Solution Formula would stimulate individual thinking constructively.

President Cowley said he wanted the concept of a suggested formula as an aid in the professional pricing of prescriptions, emphasized in our Fall Regional Meetings.

C. L. Prisk cautioned that we must not be discouraged if all pharmacists do not immediately understand the professional ethics and economics suggested in pricing formulas. Each must make his own choice and in his own way and time.

4. That the minutes of the regular Board of Directors' Meeting of the Utah Pharmaceutical Association, held August 7th, 1956, contain the following:

Dean Hiner commented on the College of Pharmacy survey among Utah drug stores concerning the economics of using some standard formula in computing prescription fees, and pointed out that the problem was a national one, and one of urgent concern if the best interests and welfare of the public is to *be upheld.* It isn't the price per se, of a prescription that poses the economic problem, he noted, but rather one of accurately accounting for the cost of ingredients used in the prescription (drugs, container, label, etc.) and then by some ethical formula determining the value of the pharmacist's professional service applicable to the prescription.

5. That the minutes of the Utah Pharmaceutical Association's Board of Directors' Meeting held at Bryce Canyon Lodge on June 14th, 1958, contain the following:

> A good discusison followed on formulas for Rx pricing which will reflect the image of the professional service, or fee, as opposed to a merchandise mark-up; and its relationship to lowering the cost of our welfare program.

6. That Ward McCarty, secretary of the Utah Pharmaceutical Association in the regular course of business received a letter dated December 19th, 1958, from John Italasano, of the Professional Pharmacy, Salt Lake City, Utah, which is as follows:

> Dear Ward:
>
> Please send us a copy of the latest pricing schedule put out by the College of Pharmacy.
>
> (Defendant's Exhibit "V")

7. Utah Pharmaceutical Association Bulletin News, January 1957, page 6, contains the following from an article by Dr. Ewart Swinyard and Victor Duke:

> No one person or group of persons can outline a method by which another possibly in a different situation, can meet his costs of doing buisness. Therefore, a prescription pricing schedule should be used only as a basis for standardizing prescription prices rather than fixing them.
>
> (Plaintiff's Exhibit "17-b")

8. Ward McCarty wrote in the Utah Pharmaceutical Association Bulletin News, April 1959 issue, page 1, the following:

Our candid prediction is that it will be an unusual drug store that will still be in operation in 1964, if it does not use some approved schedule.

(Plaintiff's Exhibit "94")

VIII

IT IS HEREBY STIPULATED WITH RESPECT TO DOCUMENTS THAT:

1. Photostats of documents may be used in lieu of original documents;

2. All exhibits are genuine and authentic;

3. Plaintiff and defendant reserve the right to object to the admissibility of any document on all grounds other than lack of genuineness or authenticity;

4. The U.Ph.A. Bulletin News is the official publication of the U.Ph.A., and that Ward McCarty, Executive Secretary of U.Ph.A. was the editor and manager of the U.Ph.A. Bulletin News from May 1955 to the present time.

IX

IT IS STIPULATED THAT DEFENDANT'S EXHIBITS A THROUGH Z AND AA THROUGH KK ARE AUTHENTIC AND GENUINE.

X

IT IS HEREBY STIPULATED BY PLAINTIFF AND DEFENDANT THAT THIS CASE SHALL BE SUBMITTED TO THE COURT FOR DECISION ON ITS MERITS BASED ON THE FOLLOWING:

1. All pleadings and documents heretofore filed;

2. The stipulations contained herein;

3. Plaintiff's and defendant's exhibits;

4. Trial briefs and oral arguments;

5. The deposition of Albert S. Veltri, submitted on behalf of plaintiff.

Dated: November 1, 1961.

UNITED STATES OF AMERICA,
Plaintiff:

LYLE L. JONES

Lyle L. Jones

DON H. BANKS

Don H. Banks

GILBERT PAVLOVSKY

Gilbert Pavlovsky

Attorneys,
Department of Justice

WILLIAM T. THURMAN

William T. Thurman

United States Attorney
for the District of Utah

UTAH PHARMACEUTICAL ASSOCIATION,
Defendant:

CHARLES WELCH, JR.

Charles Welch, Jr.

TRIAL STIPULATION X

IT IS STIPULATED AS BEING TRUE THAT THE FOLLOWING ARE RESPONSIBILITIES OF AND PROCEDURES TAUGHT IN PHARMACY SCHOOLS TO BE FOLLOWED BY PHARMACISTS IN FILLING A PRESCRIPTION. A PHARMACIST MAY CARRY OUT ONE OR MORE OF THESE RESPONSIBILITIES AND/OR PROCEDURES IN FILLING OR DISPENSING EVERY PRESCRIPTION.

I. Receipt and preliminary checks by pharmacists.

A. Notes state of patient (nervousness, reaction to questions, dialation of eyes, and the like).

B. Reads prescription in presence of patient, checks spelling of patient's name—misspelled names, foster doubts in mind of patient as to overall accuracy of dispensed prescriptions.

C. Identifies patient with prescription to assure that correct prescription is presented to correct patient (memory used in many small pharmacies; prescription numbered, check system used or employed in larger pharmacies).

D. Determines time required for filling prescription (keeping stock of item in mind).

II. Preliminary checking in prescription department.

A. Checks more carefully on authenticity of prescription (many forgeries are created every year; notes any changes which do not appear to be in the handwriting of the prescriber).

B. Determines whether prescriber is licensed and qualified to prescribe (certain persons such as podiatrists, can create prescriptions for only certain items).

C. Checks on date prescription order was initiated (since law invalidates certain prescriptions after a specified period of time).

D. Checks carefully on the medication prescribed, the dosage, and other aspects and telephones prescriber to clarify *any* questionable dosage, dosages, obvious errors, or omissions or ambiguities, (makes certain that the name, or names, of the medications prescribed are clearly understood by checking with prescriber if questionable).

E. Pays particular attention to dosages for children or elderly patients since dangers of possible overdose are extremely critical in these age and weight groups (checks with prescriber in questionable dosages).

F. Immediately makes a note on the prescription of any corrections or alternations made following a check with the prescriber.

III. Preliminary steps in compounding and dispensing.

A. Collects ingredients together from shelves, carefully checking the label of each, and noting in particular the contents to make certain they appear correct (in breaking packages, particularly careful inspection is essential to make absolutely sure that the contents appear to be in accordance with the label noting variations in color, size, shape, odor, and even taste if required).

B. Weights, measure or counts carefully the ingredients.

C. Compounds according to the art (if required) and transferrs to a suitable container.

a. Makes certain that the container will protect the efficacy of the medicine during the time of its intended use.

b. Makes certain that the container is the most suitable for use by the patient.

c. Makes choice of bottle or jar—(clear or amber, glass or plastic) dropper bottle, applicator bottle, paste-board container, collapsible tube, and etc.

IV. Labeling the prescription.

A. Determines and inserts a "prescription number" on the label (which will be the identification medium of a prescription for all future references).

B. Places date of dispensing on the label.

C. Places name of patient on the label (paying particular attention to spelling).

D. Places directions for administration or use on the label.

E. Places names of prescriber on the label.

a. Narcotic prescriptions require name, address and registry number of prescriber and the pharmacy where dispensed.

b. Applies any special labels required on the prescription container, as:

"This prescription cannot be refilled"

"This prescription may be refilled——times"

"Shake well before using"

"External use only"

"Keep in a refrigerator; do not freeze"

"Any change in color of this prescription will not affect its medicinal propetries."

V. Prescription order.

A. Makes certain to place prescription number directly on prescription document which corresponds to the number of the dispensed prescription label.

B. Enters information on number of times the prescription may or may not be refilled. (Based on knowledge of the pertinent laws and instructions of the prescriber), (if any).

C. Enters any information concerning the selections of ingredients (including manufacturer since slight variations may occur in the same chemicals making visible variations in color, consistency, etc., of dispensed prescriptions).

D. Calculates the amount to be charged for the prescription and enters this information on the prescription order for future reference if refilled.

VI. Final checking.

A. Carefully checks the label, including the prescription number (checking against the number on the prescription order, the name of the patient, the directions or instructions for use, prescriber's name, date of dispensing, etc. In many pharmacies where two or more pharmacists practice, it is customary for the second pharmacist to make this check.

B. Returns all stock containers to their proper place (as a double check on the ingredients used in the prescription). Makes certain the ingredients requiring special storage (as under refrigeration) are promptly returned to their proper storage area.

C. Wraps for presentation to patient.

VII. Presentation to patient.

A. Presents the filled prescription to the patient.

B. Explains any unusual matter relating to administration (as take before meals or after meal; take plenty of liquids following each dosage; take with milk, but not with orange juice because of acidity; etc.).

C. In families known to have children, warns to keep medication out of reach of small children.

D. Provides any supplemental administration equipment as requested by the physician or based upon knowledge of home needs.

E. Provides advice on the use of such supplemental helps and supplies used in connection with the prescription (as thermometers, inhaler, atomizer, insufflator, syringe, hypodermic or enema, hot water bottle, urinals, trusses, orthopedic aids, etc.).

VIII. File and future need of prescription order.

A. Places original prescription order into numerical file where if may be available by law for a minimum of five years for:

a. Refills of the same prescription (if permissible by law, or requested by prescriber).

b. Check by law enforcement officials.

c. Check by prescriber for information purposes.

d. Check in case of overdosage, acidental ingestion, idiosyncracies, etc.

Dated this 20th day of November, 1961.

For the Plaintiff:	For the Defendant:
Lyle L. Jones	Arthur B. Hanson
Lyle L. Jones	Arthur B. Hanson
Don H. Banks	Charles Welch, Jr.
Don H. Banks	Charles Welch, Jr.
Attorneys for Department of Justice	*Attorneys for the Defendant*

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 277

UTAH PHARMACEUTICAL ASSOCIATION, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(e) of the Revised Rules of this Court, appellee moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the district court entered on January 31, 1962, adjudging that appellant, Utah Pharmaceutical Association, conspired with others to restrain interstate commerce in prescription drugs in violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1.[1]

[1] The judgment of the district court is set out in the appendix *infra*, pp. 17-21. The district court opinion and the trial stipulations are reproduced in the appendix to appellant's Jurisdictional Statement, J.S. 1a-13a, 19a-63a. Items in the stipulations adopted by the district court (J.S. 13a) are cited herein by the section and paragraph numbers in the stipulations as well as by the page location in the appellant's appendix (e.g., "Stip. I-7, J.S. 22a").

The complaint, filed March 7, 1961, charged that from 1954 to the date of the complaint the Utah Pharmaceutical Association had conspired with its officers and members, various local pharmaceutical associations and other persons unknown to "establish and maintain uniform prices for prescription drugs sold to consumers in Utah" (Complaint, p. 4). The complaint further alleged that the co-conspirators had agreed: (1) to adopt a prescription pricing schedule formulated by the Association; (2) to distribute said schedule to members of the Association; (3) to revise said schedule and distribute it, as revised, to the membership of the Association; and (4) to urge and induce members of the Association and the local pharmaceutical associations to fix uniform retail prices for prescription drugs by use of said schedule (*id.*, pp. 4–5).

Before trial, the parties stipulated to certain facts and also to the authenticity of various documentary exhibits. The record before the trial court consisted of these stipulations and exhibits, a deposition submitted by the plaintiff, and the testimony of one witness called by the appellant. The case was heard on November 21 and 22, 1962, by Judge A. Sherman Christenson who, after considering all the evidence, entered an opinion on January 3, 1962, holding that the Association had violated Section 1 of the Sherman Act by conspiring to fix the retail price of prescription drugs (J.S. 1a–13a). The district court adopted as its findings of fact the stipulations of the parties, as qualified and supplemented by its opinion (J.S.

13a). On January 31, 1962 the court entered judgment against the defendant, enjoining it from continuing the conspiracy, from using or disseminating prescription pricing schedules and from maintaining a committee on prescription pricing, and providing other relief (App., *infra*, pp. 18–20). A motion for new trial was denied on February 21, 1962 (J.S. 16a).

The following salient facts were stipulated to by the parties and found by the court.

1. THE APPELLANT

The appellant, Utah Pharmaceutical Association, is a corporation organized under the laws of Utah with offices in Salt Lake City (Stip. I–1, J.S. 19a). Originally its membership consisted principally of drugstore owners and managers, but in 1959 active membership was limited to registered pharmacists (Exh. A). Of 255 licensed pharmacists in Utah in 1960, 195 were represented in the Association (Stip. I–38, J.S. 27a). The Association published the Utah Pharmaceutical Association Bulletin News as its official publication, and its executive-secretary was the editor and manager of the Bulletin (Stip. VIII–4, J.S. 57a).

2. INTERSTATE COMMERCE

It was stipulated that "[m]ost of the drugs used to fill prescriptions in the State of Utah are manufactured outside the State of Utah and are shipped from the place of manufacture either to wholesale drug

firms located in the State of Utah or directly to pharmacies within the State of Utah" (Stip. I–7, J.S. 22a). The dollar volume of prescription sales to consumers in Utah was admittedly "substantial" (Stip. I–6, J.S. 22a), as was the dollar volume of sales to pharmacies in Utah by drug manufacturers and drug wholesalers in the regular course of their business (Stip. I–8, J.S. 22a). Most of these drugs are sent to the pharmacist in quantities of 25, 50, 100, 500 and 1,000 in the original package or container of the manufacturers (Stip. I–9, J.S. 22a). They are sold in smaller quantities by the pharmacist, who charges for the prescription and collects a sales tax upon the entire price (Stip. I–18, 19, J.S. 23a). In the period covered by the complaint over 90% of the prescription drugs sold to consumers in Utah were sold as manufactured, and were not compounded or changed in any way by the pharmacist (Stip. I–5, J.S. 22a).

3. THE CONSPIRACY

From 1955 to 1959 the Association had maintained a standing committee (Exhs. 21, 87) called the "U. Ph. A. [Utah Pharmaceutical Association] Committee on Rx Pricing, Wages and Hours" (Stip. I–17, J.S. 23a), whose members were appointed by the president of the Association (Stip. IV–36, J.S. 36a; Exhs. 35, 95). In May 1955 the first prescription pricing schedule was prepared for the Association by Dr. Ewart Swinyard of the University of Utah College of Pharmacy (Stip. I–13, J.S. 23a; Exh. 7), who was a member of the Rx Pricing Committee (Stip. I–17, IV–14, J.S. 23a, 33a). Dr. Swinyard presented this pricing schedule to the

members of the Association at their annual convention (Stip. IV–44, IV–45, J.S. 38a). This pricing schedule was then printed under the Association name and distributed without charge to all drugstores in Utah in August 1955 (Stip. IV–1, IV–41, J.S. 30a, 37a). From 1955 to 1959, the Rx Pricing Committee was active in formulating numerous revisions of the prescription pricing schedule (Stip. I–13, I–14, I–15, I–16, J.S. 23a; Exhs. 17b, 20, 71, 72, 84), all of which were distributed to the members of the Association (Stip. IV–2, IV–10, J.S. 30a, 32a; Exh. 37).[2]

Besides preparing and distributing its pricing schedules, appellant continually urged its members to use such schedules. The July 1955 edition of the Association's Bulletin News called the schedule "the real answer to better prescription pricing in Utah," adding that "[p]rogressive druggists all over the state are adopting it" (Exh. 6). In January 1957 an article in the Bulletin News by two members of the Rx Pricing Committee stated: "It is urged that Utah pharmacists use this schedule as a basis for consistent and fair pricing throughout the State" (Stip. VI–16, J.S. 46a). The July 1957 Bulletin News urged pharmacists to "get

[2] That the Rx Pricing Committee was acting on behalf of the Association in revising these schedules is illustrated by an article in the Association Bulletin News stating:

"U. Ph. A.'s Committee on Prescription Pricing has been authorized by the Board of Directors to; Revise the present Rx Pricing Schedule; have 500 copies printed; plasticize 100 copies which the U. Ph. A. secretary will send to pharmacies for a $2 bill" (Stip. VI–45, J.S. 51a).

Furthermore, in an article in the Bulletin News the President of the Association referred to "our new Prescription Pricing Schedule." (Stip. VI–35, J.S. 49a).

a pricing schedule from U. Ph. A. and use it. It is the only fajr deal to you and your customer" (Stip. VI-39, J.S. 50a).

In March 1959 Doug Hendricks, then a director of the Association, wrote in the Bulletin News that "a 14 hour shift in a one-man store is no problem at all compared to getting the local boys to agree on an ethical Rx pricing policy" (Exh. 92). The Bulletin News of June 1959 announced a new pricing schedule would be distributed at the annual convention and urged members to get a copy and "be sure to use it. Refer to it oftener than you do the Good Book. Have as much faith in it too" (Exh. 27a).

Dr. Swinyard attended many meetings of the local pharmaceutical associations to discuss prescription pricing schedules (Exhs. 14, 15, 18, 19), and demonstrate the use of the Association's schedule (Stip. IV-8, J.S. 31a; Exhs. 16, 17, 25). The Association also organized special meetings of the county pharmaceutical associations to discuss the use of the pricing schedule (Stip. I-20, I-25, I-26, I-27, IV-37, J.S. 24a-25a; Exhs. 36, 61, 96).

ARGUMENT

Appellant's jurisdictional statement challenges (J.S. 3-4) each of the four determinations made by the court below: (1) that the alleged conspiracy to fix retail prices of prescription drugs was a restraint involving interstate commerce; (2) that the professional status of pharmacy did not immunize appellant's conduct from the Sherman Act; (3) that appellant's publication and distribution of a prescription pricing schedule with an intent to promote price uniformity

constituted an illegal conspiracy to fix prices; and (4) that such conspiracy could not be justified, since it constituted a *per se* violation of the Sherman Act (J.S. 4a–5a). We submit that the decision below was correct and that none of the questions raised by appellant is substantial.

1. The court below properly concluded that the case was within the jurisdictional reach of the Sherman Act because "the questioned activities of the Association affected interstate commerce and * * * the goods involved were in the flow of interstate commerce at the time with which we are concerned" (J.S. 7a). As shown by the Statement (*supra*, pp. 3–4), there was ample evidence to support the court's finding that the prescription drugs remained in the flow of interstate commerce, for the purposes of the Sherman Act, until they reached the ultimate consumer.[4] This Court has long recognized that inter-

[3] The Ninth Circuit reached similar conclusions on issues of commerce, professional status of pharmacy, and conspiracy to fix prices by use of pricing schedules, in recently affirming a criminal conviction under the Sherman Act of another pharmaceutical association and an individual for conspiracy to fix retail prices of prescription drugs. *Northern California Pharmaceutical Ass'n v. United States*, 1962 Trade Cases, ¶ 70,279 (C.A. 9), pending on petition for writ of certiorari, No. 276, this Term. The court there stated that: "On the matter of agreement to fix prices, the instant case * * * is on all fours with *United States v. Utah Pharmaceutical Association*, — F. Supp. — (D. Utah, 1962), a decision the reasoning of which, and its result we find highly instructive and persuasive on the several issues involved herein" (*id.* p. 26,566).

[4] In each of the following cases the product involved was held to remain in the flow of interstate commerce until it reached the ultimate consumer in intrastate retail sales: *Northern California Pharmaceutical Ass'n v. United States*, 1962 Trade Cases,

state commerce is "not a technical legal conception, but a practical one, drawn from the course of business" (*Swift & Co.* v. *United States*, 196 U.S. 375, 398). In the present case, there was a practical continuity of movement from the manufacturer to the retailer and on to the consumer (*United States* v. *Chrysler Corp.*, 180 F. 2d 557, 559–60). The objective of the interstate movement is, of course, the ultimate distribution by retail sales and the flow of commerce continues until then. As the court below noted, the pharmacist is the "sole conduit from sources outside the State of Utah to the consumers" (J.S. 7a). Cf. *Las Vegas Merchant Plumbers Ass'n* v. *United States*, 210 F. 2d 732, 740 (C.A. 9).

Moreover, even assuming *arguendo* that the retail sales of prescription drugs were wholly intrastate transactions after termination of the flow of interstate commerce, it is settled that such transactions are within the Sherman Act if they affect interstate commerce. (*United States* v. *Frankfort Distilleries, Inc.*,

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¶70,379 (C.A. 9) (prescription drugs); *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363, 366 (C.A. 8) (milk); *United States* v. *General Motors Corp.*, 121 F. 2d 376, 401 (C.A. 7), certiorari denied, 314 U.S. 618 (automobiles); *United States* v. *Erie County Malt Beverage Distrib. Ass'n*, 1957 Trade Cases, ¶68,590, p. 72,376 (W.D. Pa.), affirmed, 264 F. 2d 731 (C.A. 3) (alcoholic beverages); *United States* v. *Gasoline Retailers Ass'n*, 1960 Trade Cases, ¶69,596, p. 76,395 (N.D. Ind.), affirmed, 285 F. 2d 688 (C.A. 7) (gasoline). The fact that a prescription is prerequisite to the retail sale of drugs does not break the flow of the commodity from manufacturer to ultimate consumer, any more than would the regulatory aspects involved in distribution of alcoholic beverages, building materials to licensed contractors, etc.

324 U.S. 293, 298).[5] "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze" (*United States* v. *Women's Sportswear Ass'n*, 336 U.S. 460, 464). Here the evidence proved that appellant conspired to fix the price of prescription drugs in sales from the pharmacy to the consumer, a practice which would inevitably affect the price of the goods in their interstate movement from the manufacturer to the pharmacy. As was stated in *United States* v. *General Motors Corp.*, 121 F. 2d 376, 398 (C.A. 7), certiorari denied, 314 U.S. 618:

> Now it is quite impossible to consider the independent retail market and wholesale market as one apart from the other, for obviously without the retail sale there would be no wholesale transaction. Any restraints which affect the wholesale market necessarily must be reflected in the retail sales and, likewise, any restraints affecting the retail market necessarily affect the wholesale transaction.

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[5] Contrary to appellant's statement (J.S. 7, 18), the government at no point below waived reliance upon effect on interstate commerce as sustaining federal jurisdiction. In the oral argument in chief on this point, government counsel specifically posed the commerce issue as raising both "flow" and "effect" (Transcript of Nonjury Trial, Nov. 21 and 22, 1961, p. 61): "Unless the Government convinces you that the drugs in question are in the flow of interstate commerce or that the activities of the association substantially affected interstate commerce, then this Court has no jurisdiction and we have no case."

In the passage in the government's rebuttal cited by appellant (Tr. 250), counsel emphasized the movement of the drugs in interstate commerce ("flow") to distinguish several cases dealing with local services (see Tr. 248–250). But there was no concession or waiver on the "effect" ground.

See also *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234.

Dispositive on this point is *United States* v. *Sullivan*, 332 U.S. 689, in which the Court sustained the application of federal labeling requirements to drugs which were being held by retail druggists for intrastate sales, after having previously moved in interstate commerce. This regulation was held to be within "the constitutional power of Congress under the commerce clause" (332 U.S. at 697–698). See also *United States* v. *2600 State Drugs*, 235 F. 2d 913, 917 (C.A. 7), certiorari denied, 352 U.S. 848. Since "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied" (*United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 298), the intrastate retail sales of drugs must also be subject to the Sherman Act.[6]

[6] The reliance of appellants (J.S. 16) upon *Eli Lilly & Co.* v. *Sav-on-Drugs*, 366 U.S. 276, is misplaced. In that case, the Court considered the scope of a New Jersey statute requiring certification of foreign corporations doing business in the state. It held that a drug manufacturer which had an office and employed "detailmen" in the state did intrastate as well as interstate business and was subject to the state law. The case did not touch upon the reach of federal authority under the commerce clause or consider at all the specific question of interstate commerce for purposes of the Sherman Act. As this Court pointed out in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 545: "past decisions of this Court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy grounds to determine Congressional power under the commerce clause." See also *Stafford* v. *Wallace*, 258 U.S. 495, 525; *Northern California Pharmaceutical Ass'n* v. *United States*, 1962 Trade Cases, ¶70,379, p. 76,563 (C.A. 9).

2. The second question presented by appellants is whether their activity constituted a restraint solely on the practice of pharmacy as a learned profession and therefore lay outside the purview of the Sherman Act (J.S. 3, 19). In *American Medical Ass'n* v. *United States*, 317 U.S. 519, this Court found it unnecessary to decide whether the practice of medicine was a "trade" within the meaning of the Sherman Act, when it upheld the conviction of physicians' societies and individual physicians for restraining the business of Group Health Insurance, a corporation engaged in providing prepaid medical care and hospitalization. The Court held that (p. 528):

> * * * the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was such obstruction and restraint of the business of Group Health.

The Sherman Act is addressed to "[e]very person". The professional status of individuals or organizations is "of no significance" (p. 529).

In the present case, the complaint alleged a restraint on the "interstate trade and commerce in prescription drugs" (p. 4). Since the manufacture and sale of prescription drugs is clearly "trade" within the meaning of the Sherman Act, the conspiracy alleged and proved here was plainly a restraint upon trade.[7] As in *American Medical Ass'n,*

[7] This is true even where the professional skill of the retail pharmacist has contributed to the preparation of the drug. It is *particularly* true here, where it was stipulated that over

the fact that the conspirators were a professional organization and members of a profession is immaterial. The true nature of appellant's conduct was pointed out by the court below when it said: "* * * the factor of services in going to make up the [prescription pricing] schedule is considerably less determinative than wholesale drug prices. * * * There could be many better means for dealing primarily with the price or cost of the services of a professional pharmacist without involving an agreement for the uniform pricing of the drugs themselves" (J.S. 9a). In fact, the pricing schedule at issue regulates "only the gross return of the store for the dispensing of the drugs", not matters of strictly professional nature, and provides a method for determining "retail price" (J.S. 9a).

It is not necessary, therefore, to determine whether pharmacy is a "trade" within the meaning of the Sherman Act, since the offense alleged in the present case was a restraint on the sale of prescription drugs and not a restraint on the practice of pharmacy. As the court stated in *Northern California Pharmaceutical Ass'n* v. *United States*, 1962 Trade Cases, ¶70,379 (C.A. 9):

> We do not decide that every action of professionals is within the reach of the Sherman Act. We do decide that an agreement among professionals to fix a commodity price is (*id.*, p. 76,562).

90% of the drugs sold to Utah consumers were sold as manufactured, and were not compounded or changed in any way by the pharmacist. (Stip. I-5, J.S. 22a; see p. 4, *supra*.)

3. The third question raised is whether it was proved that appellant conspired to establish and maintain uniform prescription prices (J.S. 3, 21). Appellant concedes that it "caused to be published and caused to be distributed a particular pricing schedule" (J.S. 22). It argues, however, that there was no proof of adoption of the schedule by appellant or of an agreement to fix prices by circulating such schedules (*ibid.*). However, the facts amply support the court's conclusion that "the officers and directors [of appellant], with the intent of establishing uniform prices * * * adopted a pricing schedule and successive revisions, distributed them to members throughout the state and urged and induced the members to use the schedule for the pricing of prescription drugs" (J.S. 9a–10a). Thus, as pointed out in the Statement (*supra*, pp. 4–6), there was evidence that the Association had organized a Rx Pricing Committee; that this committee helped formulate a prescription pricing schedule; that this schedule, and subsequent revisions, were published by the Association under its name and distributed without charge to all drugstores in Utah; and that the actions of the Rx Pricing Committee had been expressly authorized by the Board of Directors of the Association. Such evidence clearly supports the district court's finding that the Association had "adopted" the pricing schedule. Furthermore, there was clear evidence of an active campaign by the Association to induce pharmacists to use its schedule. Since (as appellant

admits, J.S. 19), use of the schedule would necessarily result in uniform prescription prices, the court properly inferred that in actively urging use of the schedule, appellant intended the natural result of its actions—*viz*, establishment and maintenance of uniform prescription prices.

In any event, since appellant is an association of competitors, its publication and dissemination of pricing schedules, without more, violates the antitrust laws. In *United States* v. *Nationwide Trailer Rental System*, 156 F. Supp. 800, 805, affirmed *per curiam*, 355 U.S. 10, the court concluded that "the publication, adoption and circulation of the schedule, while not fixing a rigid price, was such a tampering with prices as is forbidden by the Sherman Act." *See* also *Northern California Pharmaceutical Ass'n* v. *United States*, 1962 Trade Cases, ¶70,379, p. 76,566; *Plymouth Dealers Ass'n of Northern California* v. *United States*, 279 F. 2d 128, 133 (C.A. 9). We submit that the publication and distribution of the pricing schedules necessarily exerted a stabilizing influence on the price of prescription drugs. "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate commerce is illegal *per se*" (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223).

4. Moreover, once appellant has been found to have engaged in a conspiracy to fix the price of prescription

drugs, all arguments that the restraint may be justified under the Rule of Reason must fail. Appellant urges that its actions were reasonable because "merely part of a plan to induce self-regulation of fees within the profession of pharmacy and therefore justified under the provisions of the Sherman Act" (J.S. 3–4, 24). But it is beyond cavil that price-fixing is illegal *per se*. (*United States* v. *Socony-Vacuum Oil Co., supra; United States* v. *Trenton Potteries Co.*, 273 U.S. 392): "Price fixing is *per se* an unreasonable restraint of trade. It is not for courts to determine whether in particular settings price fixing serves an honorable or worthy end" (*United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485, 489). "In short, there is no defense to price-fixing on the ground that it is reasonable or that it is being done by professionals" (*Northern California Pharmaceutical Ass'n* v. *United States*, 1962 Trade Cases, ¶70,379, at p. 76,561).

5. The final contention of appellant—that the broad scope of the final judgment would permit unreasonable searches and seizures by the government (J.S. 4, 26)—is clearly without merit. The access provision of the court's judgment expressly states that the "reasonable access" granted the government is "subject to any legally recognized privilege." (Par. VII, App. *infra*, pp. 20–21). A similar access provision was reviewed and approved by this Court in *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 725–728.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should be affirmed.

Respectfully submitted.

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Solicitor General.

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AUGUST 1962.

APPENDIX

Final Judgment

Plaintiff, United States of America, having filed its complaint herein on March 7, 1961; defendant Utah Pharmaceutical Association having filed its answer to said complaint on August 4, 1961; the matter having been tried on November 21 and 22, 1961; and the court having filed its memorandum decision on January 3, 1962;

Now, therefore, it is hereby ordered, adjudged and decreed as follows:

I

This court has jurisdiction of the subject matter and of the parties hereto. Defendant has combined and conspired with its officers, directors and members and with various local pharmaceutical associations to restrain trade and commerce in the sale of prescription drugs in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

As used herein:

(a) "Prescription drug" is a medication for treatment of humans, sold to fill a prescription written by a physician or other person duly licensed to prescribe for the treatment of human ailments;

(b) "Pharmacist" is an individual duly licensed to fill prescriptions written for the treatment of human ailments;

(c) "Prescription pricing schedule" is a formula or price list designed for use in computing prices to be charged for prescription drugs;

(d) "Person" is any individual, firm, partnership, corporation, association, trustee or any other business or legal entity.

III

The provisions of this decree shall apply to defendant Utah Pharmaceutical Association, its officers, directors, agents, members and employees, and other persons in active concert or participation with said defendant who shall receive actual notice of this decree by personal service or otherwise.

IV

Defendant is hereby perpetually enjoined and restrained from, directly or indirectly:

(a) Continuing to carry out the combination and conspiracy to restrain the sale of prescription drugs as found herein, or any like or similar combination or conspiracy to restrain trade and commerce in the sale of prescription drugs, or any combination or conspiracy having a like or similar purpose or effect;

(b) Entering into, adhering to, maintaining or furthering any contract, agreement, understanding, plan or program (i) to fix, determine, maintain or suggest prices or other terms or conditions for the sale of prescription drugs, (ii) to formulate, adopt, issue, distribute, recommend or suggest the use by any pharmacist or any other person of any prescription pricing schedule or other list, formula, guide, schedule, or method for pricing prescription drugs;

(c) Advocating, suggesting, urging, inducing, compelling, or in any other manner influencing or attempting to influence any person to use or adhere to

any prescription pricing schedule or schedules or any other list, formula, guide, schedule or method for pricing prescription drugs;

(d) Policing or making individual contact with any pharmacist or other person or devising or putting into effect any procedure to ascertain, determine, fix, influence, or suggest the price at which any prescription drug is or may be sold by any pharmacist, or the professional fee charged or to be charged by any pharmacist in connection with the sale of any prescription drug.

Nothing in sub-sections (b), (c), or (d) of this section IV shall be construed to restrain any pharmacy owner member of defendant Association from requiring his employees to sell prescription drugs at prices, and upon terms and conditions of sale, established by such pharmacy owner in pharmacies owned or operated by said pharmacy owner.

At any time, any agency of the United States or of the State of Utah may, upon grounds of undue hardship to it, and without having standing as a party herein, petition this court for an order enabling defendant Association to negotiate and enter into a contract for the sale of prescription drugs where the price of such prescription drugs will be paid for by the petitioning agency. Such petition may be in the form of a letter to the court with copies to be served on both the plaintiff and defendant herein. The matter will then be set for hearing at which time the petitioning agency may produce witnesses and other evidence in support of its petition. Plaintiff and defendant will be permitted to be heard and make objections to any such proposed negotiation or contract. Permission by this court to enter into any such contract shall not be considered an adjudication as to the legality or ille-

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gality of such contract under the antitrust laws, nor shall it be deemed to bar or estop the plaintiff from attacking the legality of any such contract under the antitrust laws generally.

V

Defendant Association is hereby ordered and directed to dissolve its committee on Prescription Pricing, Wages and Hours, and is enjoined and restrained from forming, appointing, or maintaining such committee or any similar committee.

VI

(a) Defendant Utah Pharmaceutical Association is ordered and directed, within 30 days after the entry of this final judgment, to serve by mail upon each of its members a conformed copy of this final judgment. Said defendant is further ordered and directed to thereupon file an affidavit with the clerk of this court that it has done so, which affidavit shall set forth the name and address of each person so served;

(b) Defendant Utah Pharmaceutical Association is ordered and directed to furnish a copy of this final judgment upon each new member thereof at the time of acceptance of such membership and to obtain from each such member, and keep for ten years in its files, a receipt therefor signed by each such new member.

VII

For the purpose of securing compliance with this final judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant, and subject to any legally recognized privilege, be permitted:

(a) Reasonable access during the office hours of the defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the defendant, relating to any matters contained in this final judgment; and

(b) Subject to the reasonable convenience of the defendant, and without restraint or interference from it, to interview officers and employees of the defendant (who may have counsel present) regarding such matters.

VIII

Jurisdiction is retained for the purpose of enabling any of the parties to this final judgment to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of the final judgment, for the modification or vacating of any of the provisions thereof, and for the enforcement of compliance therewith and the punishment of violation thereof.

Dated: January 31, 1962.

(S). A. SHERMAN CHRISTENSON,
United States District Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 277

UTAH PHARMACEUTICAL ASSOCIATION, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

BRIEF OPPOSING MOTION TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

BRIEF OPPOSING MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, Appellant Utah Pharmaceutical Association opposes Appellee's Motion to Affirm and asserts that the questions presented are substantial and merit the consideration of this Court.

Appellee's argument is devoted to a consideration of the five Questions Presented at pages 3 and 4 of Appellant's Jurisdictional Statement in the order in which they appear. For convenience, the same sequence will be observed herein.

ARGUMENT

1. Absence of Flow of, or Affect Upon, Interstate Commerce

Appellee would have this Court affirm the judgment of the court below on the stated jurisdictional basis that "the questioned activities of the [Appellant] Association affected interstate commerce and that the goods involved were in the flow of interstate commerce at the time with which we are concerned" (J. S., 7a; Motion to Affirm, p. 7). Appellee misconceives the basis upon which Appellant contends that the court below lacked jurisdiction over this case under Section 1 of the Sherman Act.[1]

The Complaint charged that Appellant and others engaged in a conspiracy to restrain interstate commerce in *prescription* drugs in the State of Utah.[2] The Complaint did not charge a restraint directed at interstate commerce in those manufacturer pre-compounded drugs which are eventually dispensed pursuant to prescription orders.[3] Drugs become *prescription* drugs only upon the issuance of prescription orders by duly licensed medical practitioners. Until that event occurs a prescription drug cannot exist.[4]

In the present appeal, the prescription drugs existed only within the State of Utah. As a consequence, they never were at any time in the flow of interstate commerce, much less the "flow of interstate commerce at the time with which we are concerned", (J. S., 7a),

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[1] 15 U.S.C. Section 1, as amended.

[2] Complaint, p. 4, paragraph 11.

[3] *Ibid.*, pp. 4-5, paragraphs 11 through 13; J. S., p. 22a (T. S., I, 5, 7.)

[4] J. S., p. 7.

because they never in the first instance entered the flow of interstate commerce.[5]

Similarly, and for the same reasons, the court below could not have properly concluded that the activities of Appellant *affected* interstate commerce. Inasmuch as prescription drugs do not exist in interstate commerce and are wholly intrastate events, Appellant could not have "engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce *in prescription drugs* * * * ". (Emphasis supplied)[6]

Even if we ignore for the moment Appellant's continuing assertion that Appellee has abandoned its reliance upon the "affecting" theory (J. S., p. 7), that theory affords no jurisdictional basis for the judgment below. Appellant invites the Court's attention to the failure of the court below to find the questioned activities of Appellant had a direct and substantial effect on interstate commerce in *prescription* drugs. In the absence of that prerequisite finding, there is no basis upon which this Court may affirm the judgment below on the "affecting" theory.[7]

As has been stated, *prescription* drugs, and not precompounded medicinal substances, form the subject matter of the Complaint in this case.[8] For that reason there was no practical continuity of movement as was present in *United States* v. *Chrysler Corporation Parts*

[5] *Page* v. *Work*, 290 F. 2d 323, 331 (C.A. 9th, 1961); cert. den 368 U.S. 875 (1961).

[6] Complaint, p. 4, paragraph 11.

[7] *Page* v. *Work*, *supra*, at page 332; *Mandeville Is. Farms, Inc.* v. *American C. S. Co.*, 334 U.S. 219, 234-238 (1948).

[8] Complaint, p. 4, paragraph 11.

Wholesalers, Northwest Region, et al.,[9] relied upon by Appellee. However, even if we assume that pre-compounded medicinal substances formed the subject matter of this case, there would be no basis upon which to conclude that there was a continuance of movement in the flow of interstate commerce. Under the rule announced in *Binderup* v. *Pathe Exchange, Inc.*,[10] the question as to whether there has been a continuance of such movement depends upon the intention of the parties to the movement. A fair assessment of the record in this case requires the conclusion that the parties to movements of substances never intended that there be a continuous and uninterrupted movement of such substances from manufacturer to consumer. All medicinal substances in this case were moved to provide for future prescription orders calling for their employment.[11] If the parties to this movement designed to meet a prospective demand had intended a practical continuity of movement into the hands of consuming patients, they would have been engaged in a criminal conspiracy to violate both Federal and Utah pharmacy laws declaring it illegal to dispense prescription drugs except pursuant to prescription orders of duly licensed medical practitioners.[12] Obviously, the parties did not conspire to violate such pharmacy laws. They intended that such pre-compounded medicinal substances would come to rest on pharmacists' shelves and await the issuance of prescription orders for them. Accordingly, there is no basis for holding that such movement con-

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[9] 180 F. 2d 557 (C.A. 9th, 1950); cited at page 8 of Appellee's Motion To Affirm.

[10] 263 U.S. 291, 309 (1923).

[11] J. S., p. 9.

[12] *Ibid.*, p. 7; J. S., 22a (T. S., I, 4.)

tinued uninterruptedly from manufacturer to consumer.

Appellee relies upon *United States* v. *Sullivan*,[13] as dispositive on the question as to whether Appellant's activities affected interstate commerce. It is important to note that *Sullivan* did not involve a consideration of the Sherman Act. As was noted in the Jurisdictional Statement,[14] this Court upheld the power of Congress under the Commerce Clause to provide in the Federal Food, Drug, and Cosmetic Act that the sale of a prescription drug, as opposed to its proper dispensing pursuant to a prescription, after shipment in interstate commerce is a criminal act of misbranding. However, this Court has never determined whether the Sherman Act extends beyond the event considered in *Sullivan* (misbranding as a result of a sale of a prescription drug) and regulates the transaction here in question, the dispensing of a prescription by a pharmacist to a patient, a wholly intrastate activity. For these reasons, *Sullivan* could hardly be said to be dispositive of the intrastate commerce issue presented in this appeal.

In view of the distinction heretofore made by Appellant between prescription drugs and pre-compounded medicinal substances, it would seem unnecessary to respond to Appellee's reliance upon *United States* v. *General Motors Corp.*[15] for the point that any restraint affecting the retail market necessarily affects the wholesale market. Unlike the product involved in *General*

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[13] 332 U.S. 689 (1948).

[14] J. S., p. 17.

[15] 121 F. 2d 376 (C.A. 7th, 1941); cert. den. 314 U.S. 618 (1941).

Motors Corp., prescription drugs are not manufactured. They do not at any time have a situs or existence outside the State of Utah. In addition, the execution of a prescription order by a duly licensed physician is an uncontrollable factor present in this case which is of the type absent in *General Motors Corp.* where the continuity of movement was planned. It follows from the foregoing that Appellant's activities could not be said to "necessarily affect" interstate commerce in prescription drugs as was charged in the Complaint.

It is asserted that Appellant's reliance upon *Eli Lilly And Co.* v. *Say-On-Drugs, Inc.*[16] is misplaced.[17] Appellant's reliance upon *Eli Lilly* is premised upon the fact that the present case and *Eli Lilly* are factually indistinguishable insofar as concerns the intrastate character of the transactions referred to therein between pharmacists and patients. Because of that factual similarity, the rule announced in *United States* v. *South-Eastern Underwriters Asso.*[18] would not appear to be controlling in this case.

2. Applicability of Sherman Act to Learned Profession of Pharmacy

The applicability of the Sherman Act to the practice of pharmacy as a learned profession has never been considered by this Court. Such a determination would affect the status of pharmacists throughout the United States and would bear directly upon the proper disposition of the same question presented in four other liti-

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[16] 366 U.S. 276 (1961); reh. den. 366 U.S. 978 (1961); J.S., p. 16.

[17] Motion to Affirm, p. 10.

[18] 322 U.S. 533 (1944).

gations.[19] If Appellant is correct in its contentions, the court below lacked jurisdiction over the present case. Clearly, this question is substantial.

Appellee says that professional status is of no significance here and that the manufacture and sale of prescription drugs are clearly "trade" within the meaning of the Sherman Act.[20] Appellee thereby ignores the distinction between prescription drugs and mere drugs which has been noted repeatedly herein.[21]

Appellee's contentions rest heavily upon the Government's interpretation of *American Medical Association v. United States*.[22] That case decided only that it was illegal under the Sherman Act for physicians to conspire to restrain the business of health insurance. That case neither reached nor decided the question here presented as to whether it likewise is illegal for members of the pharmaceutical profession to restrain the practice of pharmacy.

In referring to the sale of prescription drugs as "clearly trade" and in referring to the offense in the present case as a "restraint on the sale of prescription drugs",[23] Appellee not only begs the question as to the nature of the commerce in prescription drugs here

[19] J.S., p. 15. One such case, *Northern California Pharmaceutical Association* v. *United States*, C.A. 9th, decided June 27, 1962, is pending before this Court on Petition for a Writ of Certiorari in No. 276.

[20] Motion to Affirm, pp. 11, 12.

[21] J.S., p. 8.

[22] 317 U.S. 519 (1943).

[23] Motion to Affirm, pp. 11, 12.

drawn in question but also disregards those pharmacy laws of the State of Utah which restrict to duly registered pharmacists the right to distribute prescription drugs to patients.[24]

Appellee's contention that the pricing schedules in question regulated "only the gross return" of the pharmacy[25] as a business omits the fact that those schedules specifically provided dollar increments for suggested professional fees in computing the total charge to be made in dispensing the prescription. These schedules provided arithmetical tabulations whereby the individual pharmacist, taking into account his actual ingredient cost and the quantity prescribed, could calculate both his professional fee and the total charge to be made for any one of a multitude of prescription drugs.[26] Considered in their true light, it thus appears that the existence of the pricing schedules does not, *per se*, control the determination of the question as to whether pharmacy is a profession subject to the provisions of the Sherman Act.

3. Absence of Conspiracy

Contrary to Appellee's assertion,[27] Appellant does not admit that use of the pricing schedules involved would necessarily result in uniform prescription pricing. Uniformity of pricing would result only upon the stated condition (J.S., p. 19) that different pharmacists utilized identical cost factors and slavishly fol-

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[24] J.S., p. 7.

[25] Motion to Affirm, p. 12.

[26] T.S., I, 13-16, 19.

[27] Motion to Affirm, pp. 13-14.

lowed the *suggested* prescription pricing schedules. Yet, it is to be noted the evidence was uncontradicted that there was no uniform prescription pricing observed in Utah during the only period of the alleged conspiracy concerning which any evidence on uniformity was presented.[28] The schedules were used purely as guides.[29] These uncontradicted facts strongly suggest the conclusion that no conspiracy existed.

Appellant concedes that it distributed a particular pricing schedule under its corporate name to many practicing pharmacists in Utah. These schedules were intended for use as a guide or suggestion, something to stimulate thought about standards of professional fees in pharmacy (J.S., p. 21).

Appellant submits that the only substantial question regarding the issue of conspiracy is whether or not the mere publication and distribution of a prescription pricing schedule constitutes a violation, *per se*, of the Sherman Act. The establishment of such a rule of law would deny to any professional organization, including Appellant, the right to distribute a pricing schedule to its own membership under any circumstances. Appellant submits that this Court should not permit the establishment of such a novel and extensive rule except following a complete presentation of the issues in this case on the merits, including briefs and oral argument.

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[28] J. S., p. 12; 43-44, 46-47, Official Report of Proceedings, Non-Jury Trial (the transcript herein).

[29] Deposition of Albert Yeltri, pp. 18, 30-31, 37-38.

4. Absence of Conspiracy Under Rule of Reason

In considering the question whether a conspiracy to violate the Sherman Act has been proved, a district court may inquire whether the questioned conduct was justified under the so-called Rule of Reason.[30] The applicability of that doctrine to the facts in this case should be decided on the merits at this time due to the far-reaching effects of a summary affirmance entered by this Court.

If this Court should concur in the judgment below that Appellant conspired to fix prescription pricing, the Rule of Reason would be inapplicable. However, a fair reading of the record in this case leads to the conclusion that all the activities of Appellant were devoted to reasonable efforts to induce self-regulation of fees within the profession of pharmacy and, therefore, were justified under the Rule of Reason.

5. Broad Scope of Judgment

While there are similarities between the access provisions contained in the judgment below and such provisions reviewed in *United States* v. *Bausch & Lomb Optical Co.*,[31] this Court should re-examine the standards to be observed in approving the permissible scope of such access provisions under the Fourth Amendment to the Constitution of the United States. Unlike the provisions contained in *Bausch & Lomb* the judgment below contains no restriction upon the subsequent divulgence of information acquired by Appellee pursuant to the access provision. Additionally, consideration should be given to the need for providing on the

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[30] See authorities cited in Jurisdictional Statement, p. 25, f.n. 60.

[31] 321 U.S. 707 (1944).

face of the judgment that Appellant shall have the right of initial determination as to the relevancy of any such material.[32]

CONCLUSION

For the reasons and upon the authority set forth herein, and in the Jurisdictional Statement, Appellant submits that this appeal presents substantial questions which merit the plenary consideration of this Court.

Respectfully submitted,

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[32] See *United States* v. *International Nickel Co. of Canada, Ltd.*, 203 F. Supp. 739 (D.C. S.D.N.Y., 1962).

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